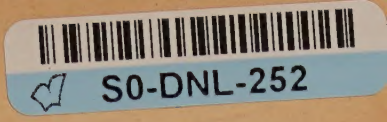
S0-DNL-252

Commentaries on the Law

IN

SHAKESPEARE

With Explanations of the Legal Terms used in the Plays, Poems and Sonnets and a Consideration of the Criminal Types Presented.

ALSO A FULL DISCUSSION OF THE BACON-SHAKESPEARE CONTROVERSY

BY

EDW. J. WHITE

Author of "Mines and Mining Remedies," "Personal Injuries in Mines," "Personal Injuries on Railroads," "Legal Antiquities," Editor "Third Edition Tiedeman on Real Property," etc.

SECOND EDITION.

THE F. H. THOMAS LAW BOOK CO.
ST. LOUIS, MO.
1913

Copyright, 1911
by
EDWARD J. WHITE

Copyright, 1913
by
EDWARD J. WHITE

NIXON-JONES PRINTING CO.
ST. LOUIS, MO.

". . . What folly I commit, I dedicate to you."

Troilus and Cressida, Act III., Scene II.

To Mary A. Wadsworth,

of Columbia, Missouri,

a most profound student of Shakespeare, Shakespearian lecturer and author of "Shakespeare and Prayer," whose friendship and encouragement prompted the collaboration of these Commentaries, the work is respectfully inscribed, with the Author's admiration and regard.

PLAN OF THE WORK.

The plan followed in presenting the law of the various plays is to quote the verse containing the law presented, under an appropriate heading, reference to which, in the index, will give ready access to the verse containing the law referred to. As the various plays and the law in each is also presented in the regular order, by reference to the body of the work, the various propositions of law contained in each play, can be found. To avoid the useless repetition of various law terms presented in the different plays, under each heading will be found, in the foot notes, the different references to the same law term or proposition, occurring in the different plays. Thus the law of the plays will be found by either of these cross references, i. e, by referring to the plays in the order of their publication, or by reference to the index and table of contents for the law term or proposition desired. This is the only practical method of presenting the subject, so that it can be readily handled by both laymen and lawyers, and it is hoped that the method followed will be found convenient.

E. J. W.

Kansas City, Mo., 1913.

THE BACON-SHAKESPEARE CONTROVERSY.

HISTORY OF THE VAGARY.

Cause and Basis of the Fallacy. The claims of those who contend that Lord Francis Bacon was the author of the plays of the immortal Shakespeare, when a reason for the existence of such a doctrine is looked for, is to be found in the fact that the hero worshipers of the Eighteenth Century had created an impossible character in the person of Shakespeare, by attributing to him superhuman knowledge. These extreme claims are responsible for the conclusion that no one person could have accomplished such miracles of knowledge as have been attributed to him. It was then but another step from the conclusion that he did not possess the literary omniscience attributed to him, to the discovery of one capable of such accomplishments.

The fond Shakespearian Commentators, therefore, with their absurd claims for the great Bard, are responsible for the refutation of such claims and the next unreasonable claim of title, in another than Shakespeare. These literary hero worshipers, not only in England and America but in Germany,[1] as well, in accordance with the natural German tendency to discover profound significance in the most trifling things,[2] found that Shakespeare knew

[1] Mr. John Fiske states that the key note of the Baconian theory was first sounded by August von Schlegel, who claimed that Shakespeare had "mastered all things and relations of this world," and treated his life as a mere fable. Fiske's "Forty Years of Bacon-Shakespeare Folly," in Atlantic Monthly for November, 1897, page 652.

[2] Lowell, Literary Essays, 11, 163.

the most scientific facts, connected with medicine, law, music, invention and the then undiscovered phenomena of the universe, the psychological facts of human nature and the whole realm of literature, christianity and the philosophies of the ancients, better than the most learned of modern times.

The problem was bound to be suggested, when and where did this son of a country 'Squire, acquire this vast fund of accurate and wonderful information? This inquiry, when considered in connection with the known facts connected with his life, was certain to result in the conclusion that such a vast fund of attributed wisdom could not consistently be found in one with such opportunities and training and this led to the additional conclusion that, given a man of such attainments, Shakespeare was not that man.

The theory and logic, granting the correctness of their major and minor premise, is not without reason. Their investigation evidences a great amount of critical inquiry, in order to find a cause equal to the effect presumed, an individual capable of the accomplishments credited to him. But the error of this school lies in accepting the miraculous results credited to the man.

Referring to the current criticism of his Author, we find that Dr. Samuel Johnson, in his preface to his edition of the plays, published in 1768, said: "His adherence to general nature, has exposed him to the censure of critics, who form their judgments upon narrower principles. Dennis and Rymer think his Romans not sufficiently Roman; and Voltaire censures his kings as not completely royal."[3] This distinguished Editor and Commentator thus feels called upon to apologize for the Poet, with the explanation that "Shakespeare always makes nature predominate over accident."

But, answering the claims of the Idolators, who assert

[3] Johnson's Works, vol. II, p. 84.

that he had mastered the whole realm of human knowledge, this distinguished scholar also observed: "Some have imagined that they have discovered deep learning in many imitations of old writers; but the examples which I have known urged were drawn from books translated in his time; or were such easy coincidences of thought, as will happen to all who consider the same subjects; or such remarks of life or axioms of morality as float in conversation, and are transmitted through the world in proverbial sentences."[4]

Thus, it will be seen, that the men of letters of that period, were criticising Shakespeare for his want of knowledge and his ignorance and this learned and just Commentator, without the halo of a hero worshiper, made due explanations for his shortcomings and also explained passages that attributed superhuman knowledge to the man.

Additional evidence could be adduced to show that the first premise of the Baconizers is unsound, in accepting the false claims of the Shakespeare Idolators, as true.

The whole trouble with the proposition is that, in disputing the absurd claims of his worshipers, the reactionaries went further and attempted to dispute his title to his works.[5] Their error consisted in ever believing or accepting the false claims of the Shakespearian Idolators, in the first instance, and in advancing another erroneous theory to defeat the error of his followers.

Once advanced, however, the fallacy that someone else wrote the plays, in accordance with the common human tendency to follow new fashions and fads—"Though they be never so ridiculous, nay, let them be unmanly, yet are follow'd"[6]—like the slander, based on hearsay, so the

[4] Johnson's Works, vol. 11, p. 106.

[5] See Fiske's "Forty Years of Bacon-Shakespeare Folly," in Atlantic Monthly, November, 1897, p. 652.

[6] Henry VIII, Act I, Scene III.

suggestion, put in motion, even as the rolling snow-ball gathered volume, until, with the passing years, among a certain credulous class, it reached the vast proportion of a settled custom, and thus it has continued, until

> "Mountainous error be too highly heap'd,
> For truth to over-peer."[7]

Issue Not Met By Abuse. As it is always an evidence of the weakness of an argument, to indulge in incrimination or abuse, the champions of the issues upon both sides of this controversy have too frequently fallen into the error of answering the just observations of their opponents, based upon careful research, by unjust criticism or abuse.

The cause of the Baconians is not at all advanced by referring to Shakespeare as "The Poacher" and the

---

[7] Coriolanus, Act II, Scene III.

The growing tendency toward agnosticism and doubt is not wholly confined to the works of the masters in poetry, such as Homer and Shakespeare, whose titles have been questioned by erratic scholars of imaginative tendencies, but the works of art of the great painters are also being questioned by doubters in the artistic realm, as well.

In July of the present year, someone laboring under an artistic brain-storm, charged through the London Post that the famous canvas, by Rembrandt, "The Mill," that for the past centuries has been recognized as one of his worthiest creations, was really painted by a Dutchman named Seghers. This alleged discovery was based upon the name claimed to have been plainly visible on the picture, after the removal of the varnish. A number of eminent artists were ready to believe the doubt and to rob Rembrandt of the title that posterity had recognized in him, to this picture. But following this news, in the Post, the eminent Rembrandt authority, Dr. Bode, was quoted by a writer in the Atheneum, to the effect that he had seen the picture immediately after the removal of the varnish and that no such name appeared on the picture. (Literary Digest, Sept. 2, 1911, pp. 354, 355.)

"Stratford Butcher-Boy,"[8] nor does it answer the legitimate suggestions or inferences of the Baconians, based upon honest research and fair investigation, to term them "A troop of less than half educated people";[9] to assert that Delia Bacon was really insane, when she wrote her erratic book; that her imitators "have been chiefly weak minds of the sort that thrive upon paradox, closely akin to the circle-squarers and inventors of perpetual motion."[10]

When such a scholar as Emerson would refer to the issue as one "Opened so that it can never again be closed,"[11] at least until positive proofs on the one side or the other can be produced, it is useless for either side to indulge in this species of evasion. Critical individuals, of sceptical tendencies have and will continue to seek a cause equal to the effect they find existing; a man, adequate to the result to be accounted for and so long as there is honest research and study of the question, the inferences and theories of those who doubt Shakespeare's authorship, ought to be given the serious attention of those who incline to the traditional authorship of the plays and it is in the interest of free scholarship and fair investigation that the controversy should be squarely met and carefully considered.

---

[8] Delia Bacon's "Philosophy of the Plays of Shakespeare Unfolded."

[9] Brandes, "William Shakespeare."

[10] John Fiske's "Forty Years of Bacon-Shakespeare Folly," in Atlantic Monthly, for November, 1897, p. 636.

[11] This observation of Emerson noted a condition and was not necessarily an opinion based upon existing proof. This statement is in keeping with the unorthodox tendency of Emerson's mind and loses sight of the real fact that a title established by contemporary testimony and resting secure through a lapse of centuries, cannot be over-thrown by mere negative evidence, but that the burden rests upon those asserting the adverse title and the proof must be clear and convincing before the vested right of the ancient title will be set aside.

However, the framing of an issue is a far different thing from the proof of such issue, by competent evidence and the observation of Emerson that such an issue, as to a title based upon credible contemporary testimony, cannot be closed so long as doubts may be expressed as to such title, is not in keeping with the rule of evidence which places the burden of proof upon those asserting an adverse title, to establish the adverse claim by clear and convincing proof and protects a title and right vested and based upon an ancient claim, against mere negative testimony of the weakness of such claim.

The Syndicate Theory. Those who oppose the traditional authorship of the plays of Shakespeare advance two principal theories, one, that the plays were written by a syndicate of poets and playwriters, and the other, that they were written by one man, but this man was Bacon, not Shakespeare.

Principal among the advocates of the syndicate theory, is Appleton Morgan, of New York, who, in 1880, in his book, the "Shakespearian Myth," fully set forth the theory of a number of writers of the plays, and Wm. H. Edwards, and others have followed this idea, in later works.[12]

There is undoubted evidence, in some of the plays, of the work of other hands than Shakespeare's. Henry VIII was, in part, unquestionably written by Fletcher [13] and perhaps parts of it by Massinger, yet there is no doubt but what the bulk of the play was by Shakespeare.[14] The earliest edition of "The Two Noble Kinsmen," in 1634, ascribed the play to "The memorable worthies of their time; Mr. John Fletcher and Mr. William Shakespeare." These plays, as Doctor Rolfe concludes, were no doubt

[12] "Shaksper not Shakespeare," 1900, and see, also, "A Cambridge Graduate," 1903.

[13] Rolfe's Henry VIII.

[14] *Ante idem.*

begun by Shakespeare, but for some reason were laid aside and left unfinished and patched out by others.

But while some fragments of evidence may be found to show that others than Shakespeare may have had a hand in writing some parts of some of the plays, this is no evidence from which his authorship of the other portions or of other plays can be denied. Other collaborators may have assisted him, or finished some few plays that he left unfinished, but if they did, they waived their right and title by letting these plays be published in his name. He was evidently the head and active member of any such partnership and any others were but silent and unknown members of the firm. He was the master genius who shaped the course of the firm's product and rendered the partnership of insignificant importance. And, if problem enough to determine what individual wrote the plays, why multiply the difficulties, by looking for innumerable authors? If Shakespeare's title were based upon a miracle, then it would be a mere combination of miracles that others should have combined with him, to produce the plays, bearing such unmistakable evidences of the genius of one and the same individual.[15]

Origin of the Baconian Theory. As the Wolfian theory, asserting an adverse title or claim to the Homeric poems, originally suggested by the philosopher Vico, in a moment of passing doubt or fancy, was later specially enlarged upon by the gifted Freidrich Wolf,[16] and a respectable number of critics followed this

[15] Even Voltaire acknowledged that "All the plays of the divine Shakespeare are in the very same taste." Voltaire's Works IX, p. 137.

[16] In the "Prolegomena ad Homerum," published in 1795, Wolf attempted to demonstrate that the Homeric poems were not the work of any one man, but were a compilation of poems written by various minstrels and sung in public assemblies, while the art of writing was but little known.

fallacy—until historians and scholars of succeeding years by a great mass of competent evidence, successfully defeated this theory and established Homer's title—so the passing uncertainties and doubts expressed by M. de Voltaire, in his criticisms of Shakespeare's plays, were later taken up and analyzed by Horace Walpole and with his fervid imagination and little care for the existing facts of history, some real doubts were expressed as to his own countryman's distinguished life work, although he had elsewhere defended this work against the unjust attacks of this same Voltaire.[17]

In the preface to the second edition of "The Castle of Otranto" and "Historic Doubts on the Life and Reign of Richard III," Walpole first expressed the theories connected with Shakespeare's life and writings that have led to the present Baconian theory.[18]

The researches of Edmond Malone, the respectable editor of Shakespeare's plays, and literary detective, whose work led to the discovery of the Chatterton and Ireland forgeries, may be said to have thrown a mere cloud or shade of uncertainty over the authorship of Shakespeare, which has also been utilized by the Baconians.[19]

And in Emerson's Essay on Shakespeare delivered in 1835, occurs the following passage: "I cannot marry this man to his verse. Other admirable men have lived in some sort of keeping with their thought, * * * but

[17] Castle of Otranto, (2nd ed.) preface, 20.

[18] Speaking of these works, in his book "Shakespeare and Voltaire," Prof. Lounsbury, of Yale, observes: "In this very volume, dealing with Richard III, appears the first example of that long line of absurd theories connected with Shakespeare's life and writings."

[19] Life of Edmond Malone, with Selections from his Manuscript Anecdotes, by Sir James Prior: Malone's Genuineness of the three plays of Henry VI; Literary Digest, for July 8, 1911, p. 61.

this man is in wide contrast, * * * Shakespeare is a voice merely—who this singer was, we know not."

These "Historic Doubts" of Walpole, Malone's shade of uncertainty, brought out as a result of his researches and Emerson's unorthodox query, suggested by his failure to reconcile the life history of Shakespeare, with his work, as a result of which he was agnostic as to the man's work and preferred to take the poet's name as the mere synonym for the work that was known as his, may be said to represent the foundation for the mad quest of Miss Delia Bacon, who sought to demonstrate, in her "Philosophy of the Plays of Shakespeare Unfolded,"[20] that Lord Francis Bacon, rather than Shakespeare, was the author of the plays known as Shakespeare's.

But about a year before Miss Bacon's book appeared, "a Mr. William Smith," in a privately published letter to Lord Ellesmere, published in London, in 1856,[21] outlined his ideas concerning Shakespeare's inability to have written the plays accredited to him, and expressed his views as to Lord Bacon's excellent qualifications for the work. Miss Bacon had written a series of magazine articles preceding her book, however, and in the book she labors at some length to convince the public that she was the inventor of the Baconian theory, and Fiske[22] and other historians seem willing to accord to her the doubtful credit of having originated the theory.

The observations that gave rise to the "doubts"; the "doubts," upon which the later theory is founded and the analysis and growth of this theory, are not without interest.

---

[20] Published in 1857.

[21] See interesting article by John H. Clifford, in Americana, Vol. XIV, tit. "Shakespeare, Authorship of."

[22] "Forty Years of Bacon-Shakespeare Folly," by John Fiske, in Atlantic Monthly, Nov. 1897, p. 636.

Voltaire's Criticism of the Plays. The iconoclast M. de Voltaire, with his aptitude for historical investigation and analytical research, notwithstanding his known antagonism and unfairness toward English authors, never questioned Shakespeare's authorship of the plays, but his criticism was leveled at the grossness found mingled with the many evidences of genius in the plays.[23]

He regrets that "We find so much more barbarism than real genius in the works of Shakespeare,"[24] but again admits that "His genius pierced through the barbarous darkness of the times, as that of Lope de Vaga did in Spain."[25]

In his "Ancient and Modern Tragedy," forgetting this barbarous period in which Shakespeare lived and wrote and that ghosts were commonly believed in at that time, this matter of fact Frenchman leveled this most extravagant criticism at Shakespeare, because he introduced the ghost into the play of Hamlet: "It seems as if nature took pleasure to unite in the head of Shakespeare all that we can imagine great and forcible, together with all that the grossest dullness could produce of everything that is most low and detestable."[26] Then admitting that the "ghost scene" has always had a most stirring effect on the English, in analyzing the plan of this tragedy, Voltaire suggests the quandary "How could so many wonderful things be generated in one head? For it must be acknowledged that all the plays of the divine Shakespeare are in the very same taste."[27] Thus, it will be seen, that notwithstanding his abuse of Shakespeare for combining in his plays the most uneven facts of science, literature,

[23] But he did not fail to avail himself of Shakespeare's labors. See Prof. Lounsbury's "Shakespeare and Voltaire," pp. 143, 159.

[24] Works of Voltaire, Vol. XXX, p. 59.

[25] *Ante idem.*

[26] Works of Voltaire, Vol. XXXVII, p. 137.

[27] Tragedy of Hamlet, Voltaire's Works, Vol. XXXIX, p. 137.

and the beauties of nature, along with the obscene and licentious and the superstitions of his age, the sceptic Voltaire, while berating him for many of the same traits that Voltaire himself possessed cannot resist the temptation to express a doubt as to his ability to produce the beauties, although willing to condemn him for the authorship of the base or ignoble found in the very same play. But this passing doubt or wonder on Voltaire's part did not even in his dubious mind arise to the dignity of a denial of Shakespeare's authorship of the plays, for in a following paragraph of the same study, he says: "The astonishment occasioned by the first wonder will cease entirely when it is known that Shakespeare has taken the subjects of all his tragedies from history or romances; and that he has done nothing more than turn into dialogues the romances of Claudius, Gertrude and Hamlet, written entirely by Saxo, the grammarian, to whom the whole glory of the performance is due."[28]

This unbeliever in miracles would thus reasonably account for the origin of the plays, by the author to whom they were accredited, rather than express a doubt as to Shakespeare's authorship, in the light of the known facts of history and contemporary testimony and by explanation of the seeming divine creation of the beautiful in the plays, he preferred to answer the claims of the Shakespearian Idolators by citing the known facts of history to demonstrate that he was a common purloiner of the works of his predecessors, instead of questioning his composition of the plays.[29]

But let us examine the character of the first witness to express any "doubts" as to the characters in the plays

---

[28] *Ante idem.*

[29] As remarked by Thackeray (The Virginians, p. 495), the works of Shakespeare commenced to grow vastly more popular, in England, after M. de Voltaire attacked him, notwithstanding the many barbarisms that could not but shock a polite auditory.

of Shakespeare, and then proceed to examine the "doubts" themselves, as history presents them.

Walpole and His Historic "Doubts." Horace Walpole, the first known prominent individual to doubt Shakespeare's characters, expressed his *doubts* about a century and a half after the plays were written. If he sought to express other than mere "doubts," upon the subject that he addressed himself to, his expressions would of course be incompetent, because purely hearsay, but the expressions of this first witness are but "doubts," at best.

But even if the witness knew facts, instead of mere "doubts" or dreams, the faith with which such doubts or dreams are to be received depends, in no small measure upon the character, for reliability of the "doubter" or dreamer, himself.

A scholar of some attainments, Walpole was rather a traveled savant, and man of social distinction, than one of accurate information or reliable authority upon any subject. Living to a ripe old age his chief object was the erection and maintenance of his famous mansion, "Strawberry Hill" and his principal literary production was his "Letters," valuable only as interesting pictures of the social and fashionable gossip of his period, but admittedly marred by the palpable want of truthfulness running through them. Judged by an accurate and truthful measure of the man, his "doubts" upon such a subject are of but little value.

Speaking of the man, Walpole, the historian Macaulay says: "The faults of Horace Walpole's head and heart are indeed sufficiently glaring. His writings, it is true, rank as high among the delicacies of intellectual epicures as the Strasburg pie, among the dishes described in *Almanach des Gourmands*. But as the *pate de foie gras* owes its excellency to the disease of the wretched animal which furnishes it, and would be good for nothing if it

were not made of livers preternaturally swollen, so none but an unhealthy and disorganized mind could have produced such literary luxuries as the works of Walpole. * * * The confirmation of his mind was such that whatever was little, seemed to him great, and whatever was great seemed to him little. Serious business was a trifle to him, and trifles were his serious business."[30]

In the preface to the second edition of his story, "The Castle of Otranto," Walpole apologizes for having "offered his work under the borrowed personage of a translator," in the first edition. He proceeds at length to answer Voltaire's criticism of Shakespeare—although entirely foreign to his subject—and asserts that "this great master of Nature, Shakespeare, was the model I copied." He also professes that "I had higher authority than my own opinion of this conduct" and closes his preface as follows: "The result of all I have said, is to shelter my own daring under the canon of the brightest genius this country, at least, has produced. * * * I should be more proud of having imitated, however faintly, weakly, and at a distance, so masterly a pattern, than to enjoy the entire merit of invention, unless I could have marked my work with genius, as well as with originality."

In this preface Walpole does not express the slightest doubt of the authorship of the plays of Shakespeare. He defends the plays from the criticism of Voltaire, whom he classes as a genius, "but not of Shakespeare's magnitude." His modeling of his romance after Shakespeare's works was the explanation of the ideal that he had endeavored to approach in his work, as did Rowe,[31] and other authors of the period, for an acquaintance with the plays produced veneration for the great "monarch of thought" and they adopted him as their standard.

[30] Macaulay's Essay, on Letters of Horace Walpole; Seely's Horace Walpole and his world; Dobson, Horace Walpole.

[31] Johnson's Life of Rowe, 348, 350.

But if the explanation, in this preface, by any stretch of the imagination, could be drawn into a statement that in publishing his book in the name of another, he had but followed the course of Shakespeare, this would be a statement wholly without facts to support it, for Shakespeare's plays were published in his name and it is the man Shakespeare himself, upon whom he bestows his fulsome praise, as the author of the plays.

In "Historic Doubts on the Life and Reign of King Richard III," Walpole speaks of Shakespeare's tragedy of that reign as "a tragedy of imagination";[32] he proceeds to show that Richard was not guilty of the crimes that Shakespeare imputes to him; shows that while Rapin conceived doubts, but failed to pursue them, he rather turned from certainties to doubts[33] and finally sums up Shakespeare's tragedy as follows:

"It is evident from the conduct of Shakespeare, that the house of Tudor retained all their Lancastrian prejudices, even in the reign of queen Elizabeth. In his play of Richard the Third, he seems to deduce the woes of the house of York from the curses which queen Margaret had vented against them; and he could not give that weight to her curses without supposing a right in her to utter them. This, indeed, is the authority which I do not pretend to combat. Shakespeare's immortal scenes will exist, when such poor arguments as mine are forgotten."[34]

In denying that the two princes were murdered in the Tower, he quotes from Lord Bacon and observes:

"Lord Bacon owns that it was whispered everywhere, that at least one of the children of Edward the Fourth was living."[35]

In view of Walpole's quotation of Lord Bacon for an

[32] Preface to "Historic doubts on the life and Reign of Richard III," p. 13.

[33] *Ante idem.*, p. 21.

[34] *Ante idem.*, p 119, 129.

[35] *Ante idem.*, p. 80

entirely different state of facts than that which the play of Shakespeare presents, it is difficult to conceive how later followers could connect Bacon with the authorship of a play presenting facts he said were not true, but this illustrates how an erroneous theory once advanced will be followed and enlarged upon by others.

Walpole connects the name of Lord Bacon, with his "Historic Doubts," to show that many doubted if the two sons of King Edward the Fourth were really murdered in the Tower[36] and elsewhere he quotes from Bacon to confirm others of his "doubts" as to other alleged crimes of King Richard.[37]

He does not extend his speculations or doubts to the authorship of Shakespeare's play but contents himself with the effort of trying to disprove the crimes and personal history of one of the Poet's most prominent characters, King Richard III, by fragmentary bits of history calculated to throw doubt and uncertainty about the truthfulness of this character, as the play presents it.

Beginning his "doubts" as a literary exercise to cure a bad case of idleness, Walpole rejected the competent testimony of contemporaries, because they "could know the facts alleged but by hearsay";[38] he constructed a defense for King Richard as a criminal lawyer will defend a guilty client, by emphasizing some small circumstances calculated to show his innocence and use this to cover up the most cogent proof of his guilt, and he continued this course until, by habit, as Sir Walter Scott observed, his "doubts later acquired in his own eyes the respectability of certainties, in which he could not brook controversy."[39]

---

[36] *Ante idem.*, p. 56.

[37] *Ante idem.*, pp. 63, 66, 75, 93, 105, 106, 131, 136.

[38] Historic Doubts, etc., p. 128.

[39] Biog. Notices and c., Horace Walpole.

See, "An answer to Walpole's Doubts," by F. M. Guidikins, published in 1768, London Monthly Rep. 1768, Vol. 1, p. 401., and also, "Remarks on Walpole's Doubts," in Archaeologia (Vol. II), by Rev. Robt. Mashers, 1772.

Of course it was an easy matter for such writers as Delia Bacon, to apply Walpole's arguments concerning the crimes and life of Richard III to the author of the tragedy, for it is but a step from the denial of the work of the creator to the denial of the creator, and many of skeptical tendencies are always ready to take this step.

Delia Bacon's Book, Presenting the Baconian Theory.

While Walpole had expressed "doubts," as to one of the characters of Shakespeare, a century later many of his arguments were adopted and presented by Miss Delia Bacon of Tallmadge, Ohio, in her "Philosophy of the Plays of Shakespeare Unfolded," in which she zealously advocated the theory that Sir Francis Bacon—said to be a distant relative of Miss Bacon—was the author of the plays of Shakespeare. She may be said to be the first to give this idea currency, therefore, although she did not originate the theory.[40]

As Walpole warned his readers against what he termed his "literary prophanation," in their eyes, because of their adherence to the established and received idea concerning the crimes and life of Richard the Third, so Miss Bacon expressed her doubts about being able to shake the faith of her readers in the belief in a character they had been taught to revere so highly as they had that of Shakespeare.

Dealing principally in promises and announcements of what will later be presented when the veil shall be finally removed, in lieu of tangible evidence, this author grounds

---

[40] "The earliest recorded surmise that the real author of the Shakespearian writings was Francis Bacon, appears to have been that of a 'Mr. William Smith,' in a privately printed letter to Lord Ellesmere, in 1856," a year before Miss Bacon's book was published. See article by John H. Clifford, in Encyclopedia Americana, Vol. XIV.

her argument upon a deep hidden design, running through all the plays, from which she evolves her theory that Lord Bacon wrote the plays and purposely concealed his identity. She concludes that but for the clairvoyant or spiritualistic powers possessed by her, to ferret out this deep laid plan—to evolve something from nothing and see that which does not exist, in fact—that the deep design would be forever lost.[41]

According to Miss Bacon, Lord Bacon, used only such language as had double meanings, and under a mountain of false premises he buried his real meaning deep down in the subject-matter of the plays for selected auditors only, or for "wits of such sharpness as can pierce the veil."[42] She selects isolated passages from the plays, as chapter headings and gives them hidden and mysterious interpretations; assays to find hitherto undiscovered meanings in the Baconian traditions and draws many parallelisms from Lord Bacon's rhetoric, when compared to that of Shakespeare;[43] unduly presents Shakespeare's incompetency and want of fitness to write the plays and Lord Bacon's eminent qualifications and ends where she began, without evidence to base her conclusion upon, that Bacon wrote the plays of Shakespeare.

From the play of Julius Caesar she draws the conclusion that it had for its object the destruction of tyranny in Government and was prompted and shaped, in its different parts, by one deeply versed in the science of government and that the author of this play possessed wisdom far superior to that possessed by the Poet. But in following the bent of her wild theory, she fails to look at the plain and simple fact that aside from the stage setting and dramatic arrangement of this play, Shakespeare reproduced, almost as an entirety, the history of the assas-

---

[41] "If this design be buried so deeply is it not lost then?" (Phil. of the Plays of Shakespeare Unfolded, p. 31.)

[42] *Ante idem.*, p. 59.

[43] *Ante idem.*, pp. 63, 100.

sination of Caesar as given by Plutarch and other historians. Read in connection with Plutarch's Lives, these attributed deep laid plans of statesmanship must be laid to Plutarch, not to the author of this play.

These observations apply equally to the alleged deep laid plans, which this author finds, concerning the expositions on "Martial Government," and "Insurrections Arguing," in "Coriolanus." The Poet but followed the description of this stern old Patrician as portrayed by Plutarch and there is nothing so abstruse or unnatural in this play as to justify any question of Shakespeare's ability to write it.

She presents the reference to astrology, in the tragedy of Lear, to show that Bacon used practically the same reference, in his works,[44] but it does not follow, from this, that Bacon wrote this tragedy, which is so entirely different from the things that he was known to write. The ideas of the scholars of this period, on such subjects, were current topics of the day, and those who moved in the same circle were no doubt familiar with the ideas and expressions of other contemporaries on the same subject. And these observations apply to the other instances from the plays where the few scattered, random thoughts are taken up and compared to similar expressions used by Bacon. She admits that Bacon wrote so that King James, "A man of some erudition,"[45] could not understand his "Novum Organum," but she neglects to state that the King was able both to understand and enjoy the simple love talk and truly human poetry and philosophy of Shakespeare's plays.

In speaking of Jonson's friendship for Shakespeare—before reaching the point where she seeks to discredit the latter—she says:

"It is enough to say, here, that he *chanced* to be hon-

[44] *Ante idem.*, pp. 129, 130.

[45] "Philosophy of Plays of Shakespeare Unfolded," p. 181.

ored with the patronage of three of the most illustrious personages of the age in which he lived. He had three patrons. One was Sir Walter Raleigh, in whose service he was; one was the Lord Bacon, whose well nigh idolatrous admirer he appears also to have been; the other was Shakespeare, to whose favor he appears to have owed so much."[46]

Strange, isn't it, that this former "butcher-boy and poacher" reached such a position that he would be classed along with Sir Walter Raleigh and Lord Bacon—two of the most distinguished scholars of the day—and yet be so utterly incompetent to perform work for which they were so well qualified?

But Miss Bacon not only admits that Shakespeare was a patron on a par with her idealized Lord Bacon, when it came to Jonson's friendship, but, as if piqued because Jonson had spoken with such affection for Shakespeare—and not of her distinguished kinsman—she further observes:

"With his passionate admiration for *these last two* stopping only 'this side idolatry' in his admiration for *them both*,"[47] and thus attempts to apply the testimonial of friendship from Jonson for Shakespeare alone also to her remote kinsman. But while thus willing to misquote the testimony to assist her client's cause, when it suits her purpose, in the next breath, to attempt to discredit Shakespeare she insists that because Jonson had not mentioned the fact that Shakespeare had met Bacon, that Jonson's evidence of his affection for Shakespeare ought to be discarded, thus making his testimonial of friendship for Shakespeare apply to Bacon. But this is common for special pleaders to abandon, with such freedom, an authority they elsewhere invoke and it is in keeping with the common tendencies of such zealots to blow hot and cold

[46] *Ante idem.*, p. 21.
[47] *Ante idem.*, p. 21.

at the same time, as does this authoress who in her introduction raises Bacon to the elevated plain occupied by Sir Walter Raleigh and Shakespeare and later resorts to Emerson's skepticism and meaningless phrase, which she paraphrases into the platitude that "this Pierre or William is but a sound when all is done."[48]

In view of these inconsistencies, is it not far fetched to conclude that Lord Bacon wrote the plays anonymously, to avoid such punishment as that which was meted out to Sir Walter Raleigh? His known writings on philosophical and dry legal subjects occupied the greater portion of his life, and his mind was not engrossed with either tragedy, poetry or comedy, such as Shakespeare was known to have written.

As if realizing, after writing 560 pages, that she had failed to establish a title for her kinsman to Shakespeare's plays, Miss Bacon, in conclusion apologizes because she "has labored throughout under this disadvantage" that her theory is "directly opposed * * * to facts which are among the most notable in the history of this country; and not only facts, sustained by unquestionable contemporary authority, but attested by public documents—facts, which history has written with her pen of iron on the rocks forever."[49]

And with this admission of the evidence thus preponderating against her asserted title does this special pleader—so resourceful in occult and undiscovered theories and surmises, in the face of such a mass of credible testimony—offer a full confession and avoidance of these admitted established facts, or does she enter a general denial? She does neither, but follows in her "Conclusions," with a general affirmation and approval of her opponent's case, because:

"The demonstrated fact must stand. The true mind

[48] *Ante idem.*, p. 50.

[49] "Philosophy of the Plays of Shakespeare Unfolded," p. 561.

must receive it. We must take our facts and reconcile them, if we can and let them take care of themselves, if we cannot."[50]

In other words, a special counsel does not guarantee his client's cause, but takes the case as he or she finds it, subject to its inherent weakness, and when, as in this instance, it is impossible to establish a worthless claim to another's property, one can only abandon the cause, if sophistry will not push the claim along, in the face of admitted facts. A pretty weak plea, this.

By way of further apology for the weakness of her client's cause, in the face of her promises and assurances, at the commencement of her plea, she further observes:

"Those very facts, and those very historical materials, on which our views on this subject have been based, hitherto, are that which is wanting to the complete development of the views contained here."[51]

So, following the admission, by way of concluson, because of the abundant evidence to establish Shakespeare's title and the weakness of her client's cause, this special pleader rests her cause rather upon the absence of evidence than the real facts to base her kinsman's title upon, and leaves the rest to sentiment and wild conjecture.

Her client's cause must fall with this admission of a total lack of evidence upon which to base a claim of title vested in another by the established proof. Nor is it a legitimate plea to urge, in the absence of competent proof, that the one without title would have asserted a claim, but for fear of duress. Duress could not transfer a title vested in another and before this plea could be received there must have been a valid title lost, unasserted or relinquished, because of coercion or fear. The condition precedent to the assertion of such a plea is the right or title in the person for whom such a plea is urged. Lord

[50] *Ante idem.*, p. 562.

[51] *Ante idem.*, p. 563.

Bacon's case must fall on these admissions of his representative, in this work, for nothing in the way of tangible proof is brought forth to sustain his claim to Shakespeare's plays.

Growth of Issue Following Delia Bacon's Book.

The Baconian theory, as such, was first elaborately advanced in the above named volume by Miss Delia Bacon and other similar books followed thick and fast after her book blazed the path for such excursions into the realm of doubt and speculation, concerning the authorship of Shakespeare's plays.

The book of Judge Nathaniel Holmes, [52] "The Authorship of Shakespeare," also championing the Bacon theory, increased the importance of the discussion. Ignatius Donnelly published his books presenting an alleged Cypher, running through the plays in "The Great Cryptogram" and the "Cypher in the Plays." The same line of inquiry was followed by Dr. O. W. Owen, of Detroit, Michigan; Isaac Hull Platt, of New York, and Mr. R. M. Bucke, of London, Ontario. And these authors, along with the works of Mrs. Potts, "Parallelisms with Bacon," Judge Webb's "Mystery of William Shakespeare," Reed's "Bacon vs. Shakespeare," Mark Twain's "Is Shakespeare Dead," Sir Edward Lawrence's "The Shakespeare Myth," and the publications of the "Bacon Society," may be said to fairly represent the Bacon side of the controversy.

Of the 2000 or more books and periodicals printed in the English language concerning Shakespeare, prior to the year 1910,[53] it is little wonder that different kinds of freak ideas and wild theories have been advanced concerning both the man and his work. The growth of the

[52] 1866, 1886.

[53] Papers of the Shakespeare Society, of New York; Digesta Shakespeariana by Appleton Morgan; Thimm's Shakespeariana, from 1564 to 1871.

literature upon the Bacon-Shakespeare controversy illustrates how a fad, when connected with such a popular subject, will grow.

According to Wyman's "Bibliography of the Bacon-Shakespeare Controversy," up to the year 1884, there had been published 255 books, pamphlets and essays concerning the authorship of the plays. In America, 161 volumes had been published and in England 69. Of these publications 73 favored the Baconian theory; 65 left the question undetermined and 23 only favored Shakespeare's title to the plays. It is probable that the proposition has remained much the same since this date, yet all this literature and the efforts of Dr. Orville Owen, to fish up something tangible from the River Wye, has not advanced the cause of Lord Bacon a jot or tittle, since Walpole first expressed his doubts about one of his principal characters and Delia Bacon applied his doubts to the great Master himself. The River Wye is a stream that modern hydraulic engineers cannot control even for a few hours, with all the modern inventions and improvements in engineering science and that Lord Bacon should have excavated the bed of this stream as a final resting place for his "Cypher" and that his wonderful engineering feat should escape the notice of any of his contemporaries is of course ridiculous, yet it is just as reasonable as that he wrote the plays of Shakespeare.

It is not possible in the space allowed to this article, to give anything like a correct review of even the most exceptional of the various Bacon books, following the work of Delia Bacon, but a terse analysis of a few of them may be attempted.

Donnelly's "Great Cryptograph and 'Cypher.'" Like Poe's story, the "Gold-Bug," these books present a curious explanation of the process by which the author attempted to unravel a cypher running through the plays of Shakespeare, by means of words at irregular and odd intervals commencing with

the initials of Lord Bacon's name and letters used in other lines of other plays to also spell his name, and message, when disconnected and used to suit the author's purpose.

Of course cyphers had been in general use, ever since the days of Julius Caesar and were used by him and by other distinguished men, including King James II and other prominent men of Bacon's period. Bacon himself, as history advises us, was also interested in cryptography, and devised and explained cyphers by the use of words, as well as by the use of letters and alphabets. One of his cyphers was to employ only the letters a and b, arranged each of them in groups of five, so as to represent all the 24 letters of the alphabet. The fact that he was known to be interested in cypher codes may have given Mr. Donnelly the idea of trying to decipher that he used such a means of advising posterity that he had written the plays of Shakespeare, but as no tangible evidence is produced to sustain this theory, in this book, it has not been generally received. [54] Like the same author's "Atlantis," creative genius and imagination, akin to that of Walpole and Miss Delia Bacon, are the most marked evidences of this work.[55]

The "Cypher," by the same author, is based upon many large figures, additions, subtractions and multiplications, to get certain words, which are then presented as explaining the real author's meaning. For instance, in the chapter, on "Why Bacon denied the authorship of the plays,"[56] the author finds the word "I" by the fol-

[54] While not generally received, Donnelly presented the cypher in the play so plainly that Dr. Owen could see it, as he did the lost records through the mud and silt of the tempestuous river Wye and the same theory has been accepted and enlarged upon by Isaac Hull Platt, of New York, and the late R. M. Bucke, of London, Ontario, who, like Delia Bacon, have been no doubt given the power to see that which does not exist except in their minds.

[55] George Brandes terms this book the "Crazy Book."

[56] "The Cypher in Shakespeare's Plays," Chap. XXVI.

lowing method: "Let us take 257 again"—but why this particular number he does not say—"and instead of adding the modifier 253 to it, deduct 253. This leaves 4; add 532, the number of words on page 74, and we have 536, deduct the modifier 50, and we have 486; carry this through page 73 (406) words and we have 80 left; add 167 and it gives us 247; add 29 and we have 276, which on the next column is the word "I."[57] By pursuing this process, over several pages, he deciphers the words "I would rather die a thousand deaths than bring such great disgrace,"[58] and from this, he concludes that Bacon thus wrote the plays and by this round about, haphazard method, gave his reason for denying the authorship.

Of course such methods are not only those of a special advocate, but such a Chinese puzzle would more seriously reflect upon the author.

There is no doubt but what the pages when these plays were written were not of even size with those used to obtain these figures and even if they were, since no method is used to get the words, but modifiers and subtractors and multiples are used at random to pick out the word wanted to construct the given sentence, by a method equally as logical the author could have figured out words to construct the sentence "The moon is made of green cheese" and then adopted this proposition as an irrefutable conclusion, from the plays.

Mark Twain's Book, "Is Shakespeare Dead?" Mark Twain admits that he learned his Shakespeare from his River Pilot, Ealer, who knew his Shakespeare well and who had no sympathy whatever with Delia Bacon's erratic and unphilosophical "philosophy."[59]

[57] *Ante idem.*, p. 194.

[58] *Ante idem.*, p. 197.

[59] "Is Shakespeare Dead," p. 8. A pity that this same River Pilot could not have piloted this distinguished Missourian around the shoals and quicksands of this Baconian theory, in his latter days.

He says that he is an agnostic upon the authorship of the Shakespearian plays; denies that Shakespeare wrote the plays and *suspects* that Bacon may have written them, but does not know.[60]

Judged by this book, the trouble with Mark Twain is that he places the adherents of Shakespeare's title in the position of "assumptionists," whereas, they only accept the evidence at hand, without attempting to deny it, or explain it away, while he prefers to take assumptions, as facts and to deny the facts, as they really exist.

He "assumes" that no stir was made over Shakespeare's death, because his great plays were not published until 24 years after his death, but in this he does "assume," for he bases this statement upon no known fact. He "assumes" that the townspeople of Stratford did not mourn him long and if this assumption had evidence to rest upon, it would count for but little, for the townspeople of this country town, in that day were not an educated class, and but few of them probably really knew of the great work their local modest prophet had achieved. He concludes, by the expressed wonder that history had given us no evidence of the great calamity felt by his contemporaries at Shakespeare's death. If this is any evidence to question Shakespeare's title to his plays, the same observation could be thrown out to question the life work of every poet of that and later periods.

Dr. Johnson, in his life of the great Dryden, shows that his body, through a misunderstanding of patrons who were providing for his burial, lay for a week or so at an undertaking establishment and it was later buried through the charity of friends.[61] If such a state of facts connected with Shakespeare's death could now be produced by the Baconians, it would furnish something more than mere conjecture that he was not mourned by the whole popula-

[60] *Ante idem.*, p. 50.

[61] Johnson's Life of Dryden, (1803), p. 243.

tion of Stratford when he died, but would it then be any evidence to rob him of the title to his plays? It is not contended that this sad circumstance in any manner effects Dryden's title to his poems.

But is it true, as Mark Twain assumes, that Shakespeare was not mourned at his death?

When he died, Milton was eight years old and he was likewise thirty, when his friend Ben Jonson died and he must have known them both and no doubt enjoyed a personal contact with Jonson, who was Poet Laureate, when he died. At thirty-seven Milton wrote his poems, L'Allegro and Penseroso,[62] in which he spoke of both Shakespeare and Jonson, in referring to the pleasures of his boyhood days, at his father's house, near Windsor Castle:

> "Then to the well-trod stage anon,
> If Jonson's learned sock be on,
> Or sweetest Shakespeare, fancy's child,
> Warble his native woodnotes wild."

And in speaking of Shakespeare's death, he says:

"What needs my Shakespeare for his honored bones?" If this is not evidence that he rested in an honored grave, or that his distinguished countryman mourned his loss, then it will be difficult to establish the fact by an honored or credible witness, to the satisfaction of the followers of Delia Bacon.

His death attracted such attention, even at that period of the world's history, that the exact details were noted in the town of his residence and have been handed down for three centuries. Doctor Johnson says: "The character and acquisitions of Shakespeare were known to multitudes."[63]

As long ago as 1769 David Garrick organized a festival at Stratford, in honor of Shakespeare and it lasted for

[62] Johnson's Life of Milton, (1803), p. 70.

[63] Johnson's works (1803), Preface to Shakespeare, Vol. 2, p. 106.

three whole days; was opened with "salvos of artillery"; was marked by the erection of a statue; the illumination of the town, a mask ball, two public breakfasts, a dinner and toasts, and the oratio of Judith, in Trinity Church and music of the Drury Lane Orchestra. Is this no evidence that the great Bard rested in an honored grave?

Twain puts the question, "Did Francis Bacon write Shakespeare's works?" and then he answers, "Nobody knows."[64] He does not assume to possess either the assurance or the familiarity with his subject that the colored pastor did, when he established the existence of Divinity, by answering the interrogatory "Is there a God," by the affirmation, "there is," but thus denies any knowledge of the subject he undertakes to elaborate, both for himself and for all others. If "nobody knows," then why should Twain afterward indulge the presumption that because of Shakespeare's unfitness to write the plays, that Bacon, or some other person, equally capable, did write them? By the same argument, or lack of opportunity to accomplish this work, the creations of the poets of the same and later periods could be divested, for little is known of the lifework of most of them, and by much stronger circumstances, in later years, the life work of such men as our own great Lincoln, can be questioned, for he began with much meaner beginning than did Shakespeare.

Twain forgets to judge of Shakespeare's life, according to the history of the time when he lived. It is not legitimate to compare the means and facilities now existing with those of that period. The difference in the conditions are too apparent to require comment, for while true that Twain's work has made him known to the people of his country, in the generation in which he lived; it does not follow that he would not have gone with the unnoticed

[64] "Is Shakespeare Dead," p. 102.

millions who then lived and worked, if he had done the same work three centuries ago.

After the admission that "nobody knows" whether Bacon wrote the plays or not and the dearth of evidence to divest the title of Shakespeare, Twain may well conclude that there is no danger "that Shakespeare will have to vacate his pedestal this side of the year 2209,"[65] for not only until this year, but so long as competent evidence is required to establish given facts, his title will rest secure against the attacks of those who proceed upon mere conjecture and surmise.

> "For mine honour (which I would free),
> If I shall be condemned, upon surmises,
> All proofs sleeping else, but what your jealousies awake,
> I tell you, 'tis rigour and not law."[66]

The Law in the Plays. The great quantity of law presented in the plays is one of the strongest circumstances urged by the Baconians to attempt to establish Bacon's authorship of the plays. Lord Campbell is quoted to the effect that "To Shakespeare's law, lavishly as he propounds it, there can neither be demurrer, nor bill of exceptions, nor writ of error."

But this statement is far too general to be accurate, for the law is not always correctly presented in the plays. A notable instance is furnished by the trial scene, in "Merchant of Venice" where illegal reasons are assigned for the judgment against Shylock and his affirmed legal rights, said to exist by reason of the obligations of a bond—clearly void, because contrary to public policy—are afterwards struck down by a shocking piece of pleasantry, based upon a mere subterfuge.[67] No scientific lawyer, such as Bacon, could have written this play, or

---

[65] "Is Shakespeare Dead," pp. 129, 130.

[66] Winter's Tale, Act III, Scene II.

[67] Von Ihering's "Struggle for Law," p. 80.

make Portia deliver such a judgment, for a lawyer honors and extols the majesty of the law as a matter of second nature and would never, in the climax of pronouncing judgment, thus strike down an affirmed right, by any such sophistry, based upon such a well known illegal position. No object of dramatic climax could have compelled Lord Bacon to thus sacrifice the law, in writing this judgment scene.

Judge Webb, in his "Mystery of William Shakespeare," points out many specific instances to show that "Greek and Trojan, Roman and Syracusan, Ancient Briton and Scandinavian, Venetian and Illyrian, Lord and Lady, all discuss the jargon of the English Courts."[68]

Because of this quantity of law presented in the plays, Judge Webb is willing to infer or surmise authorship in a lawyer, preferring to create poetic genius sufficient to write the plays, in a lawyer, not known to possess such genius, than to presume a smattering of law, by a poet, known to have written plays, by the following process of reasoning:

"In the one case there is a startling contrast, between the man, as we know him, and the works as we possess them; in the other, the works as we possess them, and the man as we know him, are in strict accord. And hence, it is, that in the latter case, we are ready to *infer* authorship of the works, because we recognize the qualifications of the man, while in the former we attribute the qualifications to the man, because we regard him as the author of the works."

That this is a wild presumption, is most apparent when it is remembered that the plays abound in poetry and that Shakespeare was known as a most gifted poet, and that Bacon was a profound lawyer, but not a poet of ability sufficient to have written these plays. To attribute this work of a poet to a lawyer, because the work incidentally

[68] Webb's "Mystery of William Shakespeare," pp. 167, 168.

contains law, rather than to a poet, known to have accumulated a smattering of law, is indeed, a more striking contrast than to accept the traditional authorship by one known to have created similar work.

But for a lawyer to indulge in an inference, in the face of an established fact, is a paradox. Inferences are only indulged in, in the absence of the known facts, and then they always depend upon the knowledge of the surrounding facts on the part of the person indulging such inferences. But if the accumulated evidence of Shakespeare's contemporaries is to be brushed aside and inferences indulged in, why indulge in such an unreasonable inference as that a philosophical old lawyer, known to write long and ponderous essays on legal and philosophical subjects, wrote poetry and comedy and tragedy, because a smattering of law is set forth in such works, when he was not known to have performed such work and there were so many others known to perform similar work, living at the same time? Many men of letters of Shakespeare's period wrote plays, so why attribute plays to one not known as a play-writer, when there were so many play-writers, who could have written the plays. In other words, the works the presumption attaches to, are those of a poet, therefore a poet wrote the plays, not a lawyer. This would surely be a much saner presumption, if inferences are to be indulged in at all, but why speculate about the existence of a fact affirmed by competent testimony? Why not accept the fact as established by the credible testimony? Shakespeare claimed the plays and was the acknowledged author of the plays; it is known that he wrote plays, so why deny his authorship, because of a presumption or inference of his incompetency? Bacon is not known to have written plays; he never claimed these plays, so if he ever wrote plays, why presume that he wrote Shakespeare's plays?

With notice of the claim, Bacon stood by and silently saw another claim and publish the plays and sonnets,

without urging his claim thereto. By an ancient principle of equity, therefore, he estopped both himself and his admirers from afterward claiming these plays, when he thus failed to speak and assert his claim, when he should have spoken and upon sound principle the Baconians are precluded from indulging these post-century inferences concerning his title, because of another rule of law against the assertion of such stale claims.

A Danish scientist, has recently discovered that Shakespeare's types present the best studies in criminology that the world has ever had,[69] but he does not question his authorship of the plays for this reason, but rather attributes this fact to the genius of the author, to his love for humanity and to the fact that he analyzed the motives of his fellows and put and answered the same questions that psychologists today are asking and explaining why it results that this or that crime fits this or that individual.

No amount of study would give this deep insight into criminology and the inner recesses of the human heart that the criminal types in Shakespeare present, but such delineations, so true to life, like the true and just creations through paint and marble, by Raphael, Michael Angelo and the other geniuses that the world has produced, have rather this divine gift as a basis for their existence.

---

[69] Goll's "Criminal Types in Shakespeare," pp. 24-30.

Of the great number of books and pamphlets written on the controverted title of Shakespeare, none are so convincing as those written by lawyers, based upon the great amount of accurate law that the plays contain, to throw doubts on the authorship of the plays by Shakespeare.

Principal among these works are those of Judge Nathaniel Holmes, Lord Penzance, Lord Campbell and Judge Webb, of Dublin.

Judge Webb's work, "The Mystery of William Shakespeare," is the latest and perhaps the most forceful of these.

(See Holmes' "Authorship of Shakespeare," 4th ed., Boston, 1886; Penzance's "Shakespeare Problem, Re-stated," Chap. XIII.)

The Cases from Plowden and Leonard's Reports. The case from Plowden's Law Reports, of the death by drowning, of Sir James Hales, used as a basis for the argument by the grave-diggers, in Hamlet, is referred to by Judge Holmes and other Baconians, as a most cogent reason why Shakespeare could not have written the play, but that it must have been written by a lawyer, since it was not known that Shakespeare had heard of or read this case. Of course this is a mere assumption, for the case may have been read by some one of his many acquaintances at the Inns of Court and he could easily have procured the book and read the case, if at all interested in the singular circumstances connected with this case of *felo de se,* and later applied it in this death scene in Hamlet.

From the presumption—indulged in the absence of any knowledge of the facts—it cannot be concluded that he did not read the case and hence could not have written the play. Nor is the other conclusion at all reasonable, that he had to necessarily read this case, to have composed this scene at the burial of Ophelia.

But even if both of these conditions were essential, it is just as improbable to conclude that because Bacon was a lawyer, he must have read this case and have written this scene of Hamlet.

In Greene's Menaphon, published in 1589, it is said that Shakespeare left the "trade of Noverint" to become a dramatist. "Noverint" was a well known slang expression to indicate the business of a lawyer's clerk, or apprentice, so from this and other evidence, of his experience in a law office, prior to that year, he could well have read the case of Sir James Hales, which was published in 1578. It no doubt attracted a great deal of attention, not only because of the character and standing of the suicide, but also because of the unique reasoning whereby the forfeiture was enforced against his widow, so even if Shakes-

peare had not been for a time in a lawyer's office, it is not an irrefutable presumption that he nevertheless read or discussed this case, with some of his lawyer friends.[70]

An Irish King's Counsel, has recently found an old case in Leonard's Reports,[71] where Justice Manwood refers to a case of robbery, at Gad's Hill where one of Sir James Hales' servants was robbed and the "men of the hundred" of Gravesend, in Kent, were sued under the old English statute, because of this robbery and he says that such robberies there were so frequent that if a recovery were allowed the hundred would be bankrupted.

This case was reported in 1577 and First Part of Henry IV was produced in 1579, so, like the case of Plowden, referred to in Hamlet, this is some evidence that Shakespeare may have taken the robbery in this play from this reported case, which some of his studies may have brought to his attention or some of his lawyer friends, at the Inns of Court, may have discussed with him. But this reference in the play, to a law report, is no evidence upon which it can be concluded that a lawyer wrote these plays, even if it were known that the incidents referred to were taken directly from these reports, for the reports were not inaccessible to Shakespeare and the cases named were no doubt much discussed at the time. Instead of disproving his title to these plays, these circumstances only furnish the sources for his information, either directly or by hearsay, for two of the minor incidents in the plays referred to.

---

[70] This is the conclusion, as to this case advanced by Dr. Fiske in his "Forty Years of Bacon-Shakespeare Folly," Atlantic Monthly, for November, 1897, pp. 645, 646. See, also, learned discussion by Fischer, of Heidelberg, in his essay, "Shakespeare und die Bacon-Mythen," read in 1895, before the Shakespeare Society, at Weimar.

[71] Leonard, p. 12.

Similar Law References of Other Writers.

Shakespeare had the same means of becoming familiar with the character and work of lawyers and the details of the various actions he refers to that Dickens had, yet a recent writer has shown that Dickens has truly portrayed the various types of lawyers, as one meets them to this day, in the English Courts: "The range of legal characters conceived by Dickens was very wide. We have seen the trim, trig, and ordinary in Mr. Perker; the contingent fee sharpers in Dodson and Fogg; the bullying pettifogg in Serj. Buzfuz; the commonplace, hard-working, cunning barrister, in Serj. Snubbin; the sloppy, down-in-the-heel bankruptcy braggart in Solomon Pell; the reprobate magistrate in Fang; incarnate villiany in Sampson Brass; the faithless humble hypocrite in Uriah Heap; the weak, ineffective and unfortunate man of promise in Wickfield; the ingenious humbug in Spenlow, and his incompetent partner, Jorkins; the faithful, assidious old-fashioned family solicitor, in Mr. Tulkinghorn; the self-satisfied legal narcissus in Kenge; the eminently respectable expert chancery cunctator in Vholes; the sublime sacrifice of the brilliant Jackal in Carton; the strident, successful and shouldering barrister, in Stryver; the great forceful, bullying master of criminal law in Jaggers; and the social legal dilletant, in Lightwood and Wrayburn. What is there left? Notice, too, that each is a distinct type, complete and disassociated in its setting."[72]

It is well known that Dickens was not a lawyer. Shall we conclude that some one of the many good lawyers of his day wrote his various works, because the life and character of various types of lawyers is thus accurately portrayed by him? Certainly not, yet it is just as reasonable as to discredit Shakespeare's work, because he also portrayed the work of lawyers, with not a whit more accuracy than Dickens and other writers have done.

[72] George Packard, in 45 American Law Review, p. 562.

If it be suggested that these are mere legal types and not distinct cases, we have but to refer to the London Physician's details of the common law ejectment suit, in "Ten Thousand a Year," George Eliot's complex legal plots, in "Felix Holt," and "Daniel Deronda" and Bulwer-Lytton's details of the law suit in "Night and Morning," as signal illustrations of other literary writers who have resorted to law reports and legal subjects, as a means of presenting some phase of their plots to the public.

Comparison of Shakespeare's and Bacon's Works.

But it is not only upon the proposition that the plays are too great and out of proportion to Shakespeare's ability, that the Baconians advance their argument, but the parallelisms in the plays with Bacon's works and coincidences of thought and expressions are also cited as evidence of the authorship by Bacon.[73]

From Bacon's "Promus," or treasury of beautiful thoughts, taken by him almost literally, in many instances, from the Proverbs, from Virgil, Horace, Ovid, Seneca, the ancient philosophers and the most beautiful literary productions of the different tongues, which happened to strike his attention, there are no doubt many thoughts and sentences which are quite similar to thoughts and expressions in the plays of Shakespeare, and this circumstance is seized upon by many of the unorthodox school as some evidence to show that Bacon wrote the plays.[74]

That there are many resemblances in the forms and manner of expression used by these two writers is very evident, but this is no doubt due, in large measure, to the fact that they both borrowed from the same source.

[73] See "Wit, Humor and Shakespeare," by John Weiss, 1876.

[74] See Mrs. Henry Pott's 600 page book, published in 1883, wherein she sets forth several hundred quotations from Bacon's "Promus," which remind her of similar passages in Shakespeare's plays and poems.

There are also some quotations set forth by Mrs. Potts which would go to show that Bacon had purloined Shakespeare's thoughts and in some insances, Shakespeare may have used his ideas.

The historian, John Fiske, instances many cases wherein Bacon reproduced Shakespeare's thoughts almost literally, such as in the "Essay of Wisdom," published in 1612, wherein he quotes from Hamlet, published in quarto, in 1603, and another expression in the "Essay on Gardens," first published in 1625, where the same thoughts expressed in Twelfth Night, published in book form with the edition of 1623, are expressed by Bacon.[75]

But though there are instances that can be cited to show that Bacon expressed the same thoughts that Shakespeare expressed, or *vice versa*, this argues nothing, except, perhaps that they both consulted the same authorities, or used the same books, or expressed the same current thoughts, or each, in turn, may have read the writings of the other.

But the known writings of the two men are essentially and radically different. While Shakespeare was engaged in the composition of his thirty-seven plays, two poems and one hundred and fifty-four sonnets, Bacon was laboriously constructing his new system of philosophy. He was not an idle man and did not spend his whole time on this work, nor on his other known literary productions, for he was during his life, a distinguished chancery lawyer, with a lucrative practice; member of Parliament; Attorney-general of the kingdom; solicitor-general and Lord Chancellor. His work of revising his new philosophy was far from finished, at his death, so even if he had possessed the poetic tendency and there had been disclosed any evidences to demonstrate that he was, in addition to being the able lawyer and philosopher that he was known to be,

[75] "Forty Years of Bacon-Shakespeare Folly," Atlantic Monthly, for November, 1897, p. 648.

also a born poet, such as he would have to be to have written the plays of Shakespeare, it is extremely doubtful, if he could possibly have written these monumental works and also have accomplished his other known works, of such radically different kind.

Shakespeare's Mistakes Not Those of Bacon. Not only in the law, but in the historical facts, as well, Shakespeare made mistakes that Bacon would never have made. As observed by Dr. Fiske, in his "Forty Years of Bacon-Shakespeare Folly:"[76]

"Bacon would hardly have introduced clocks into the Rome of Julius Caesar; nor would he have made Hector quote Aristotle, nor Hamlet study at the University of Wittenberg, founded five hundred years after Hamlet's time; nor would he have put pistols into the age of Henry IV, nor cannon into the age of King John; and we may be pretty sure he would not have made one of his characters in King Lear talk about Turks and Bedlam."

These are not the mistakes of such a scholar as Bacon, but are the little uniformed facts peculiar to a broad but not technical or accurate education, such as Shakespeare possessed, according to the evidence of his friends, who knew his limitations, but appreciated his great genius.

Scant Knowledge of Shakespeare's Life. Much stress has also been laid, by those who question Shakespeare's title to the plays, upon the fact that but little is known of a large portion of his life; but the world knows about as much of the life of Shakespeare as it does of the lives of any of the other dramatists or poets of that same period. Alexander Pope was born in London, over a century after Shakespeare's birth, yet, in

[76] Atlantic Monthly, for November, 1897, p. 647.

his biography, Dr. Samuel Johnson said that he came of parents "whose rank or station was never ascertained."[77]

Professor Hales, is his biography of Spencer, said that "the life of Spencer is wrapt in a similar obscurity to that which hides from us his great predecessor, Chaucer, and his great contemporary, Shakespeare."

Of the dramatist, William Congreve, who lived a century after Shakespeare, Dr. Johnson, in his biography, said: "Neither the time nor place of his birth are certainly known; if the inscription upon his monument be true, he was born in 1672." Of William Broome, the same distinguished authority said: "William Broome was born in Cheshire, as is said, of very mean parents. Of the place of his birth, or the first part of his life, I have not been able to gain any intelligence."

Practically the same thing has been said by competent authorities, of the lives of Beaumont and Fletcher,[78] Webster,[79] Marlowe,[80] Massinger,[81] and many other of the brightest minds of the same and later periods.

By such argument, therefore, most of the literary material of the same period can be discredited and the writings of the brightest poets and dramatists of the world's history taken from them, so no plausible theory, concerning the authenticity of the plays ought to be based upon the scant information concerning the man.

---

[77] The improbability of Shakespeare, as a country lad, developing, in a few years, into the leading dramatist of the world, is no more improbable than that the voluptuous rake should soon become the virtuous St. Augustine; that the Corsican peasant should develop into the Emperor Napoleon, or that the rail-splitter of the past century should become the President of the greatest nation in the world. History records these phenomena and many similar ones.

[78] "Mermaid" Series of English Dramatic Writers.

[79] *Ante idem.*

[80] Ward's History of Dramatic Literature; Dyce's Edition of his works.

[81] Fleay's Biographical History of the English Drama.

Evidence Establishing Shakespeare's Title. Where property rights, in law, are subject to dispute, a title may be based alone upon the possession, and enjoyment of the given disputed property, for a series of years, without more. If an established reputation of ownership alone is sufficient to prove a right to property, coupled with general recognition and a continuous user and enjoyment of the property, it would seem that Shakespeare's title ought to be secure, especially as against Bacon, and his followers, as his title was asserted, without dispute, and his plays were published during Bacon's life time and he never once asserted title in himself. A title thus standing without dispute, until the lapse of centuries, ought to have more than mere surmise to overthrow it, and according to the proper legal standards for determining property rights, the adverse claims of Bacon's followers are effectually barred by limitations, laches and estoppel.

But the title of Shakespeare does not depend upon mere limitation and the special defenses of laches and estoppel. He has the best of evidence, to establish, by affirmative proof, his title to the plays and poems.

The fact of his birth, his attendance at the "free-grammar school of Stratford," his poaching experience, his marriage, his connection with the Globe theatre, his playwriting and his relations with Ben Jonson and other distinguished men of his period, are facts well known to every school boy, who has read the history of English literature.

Spencer is known to have referred to him, in his "*Tears of the Muses,*" published, in 1591; a contemporary and brother Dramatist, Chettle, in 1592, offered a printed apology for an offense offered to Shakespeare and he expressed himself as appreciatory of his worth both as a man and an author; Frances Mere's in his *Wits Treasury,* published in 1598, spoke of him as the "most excellent

among the English for both kinds of tragedy and comedy." Milton, a boy of eight, when Shakespeare died, "of the English poets, set more value upon Spencer, Shakespeare and Crowley."[82] Writing on the blank leaves of Mr. Garrick's book on Rymer's "Remarks on the Tragedies of the Last Age," Dryden said: "In the last of these, Homer excels Virgil; Virgil all other ancient poets; and Shakespeare all modern poets."[83]

John Hale's reference to Shakespeare and Jonson, in 1633; Jasper Mayne's reference to the dramatist, in 1637; Leonard Digges' reference to the Poet, in the edition of his poems, in 1640; the learned Fuller's description of the Poet, in his "Worthies," in 1642; Lady Margaret Cavendish's reference to him, in the "Prologue" to her plays, in 1662; Dryden's reference to him in his "Essay on Dramatic Poesy," in 1668; Langbaine's tribute, in his "Account of English Dramatic Poets," in 1691; Tate's "Address," in 1680, along with Richard Farmer's "Essay on the learning of Shakespeare," in 1766, and other similar articles furnish abundant testimony of contemporaries and others of the Poet's ability and genius necessary to produce the works accredited to him and also of his actual production of the works known as his.

While true that the first published volume of the plays occurred seven years after Shakespeare's death, many of the plays were published and acted during his life and friends and contemporaries best knew of this work and never questioned his title to the plays. Bacon, Jonson and many of the actors and dramatists who wrote when he lived were alive when the plays were published. They knew whether or not he wrote the plays and if he had not, would not his rivals and critics have raised the issue then? It is hardly probable that the many learned men of that period and of the succeeding generation were all parties

[82] Works of Samuel Johnson, Vol. IX, p. 138.

[83] 1 Johnson's Lives of English Poets (1803), p. 198.

to a gigantic scheme to permit one favored plagarist to perpetrate such a fraud upon posterity. It is unreasonable in the extreme, for his many rivals in the dramatic art would never have loaned themselves to such a scheme, even if his immediate friends would have been *particeps criminis* to such an outrage.

Bacon was alive when the first edition of the plays were published, by Heminge and Condell, in 1623, and his friend Ben Jonson wrote the dedication and spoke of the picture on the title page as the likeness of "gentle Shakespeare"; his works were accepted by all classes as his own, both during his life and after his death, for a century and a half, without dispute; he received special marks of approval and favor from Queen Elizabeth, and from her successor, King James, who honored the poet with a letter in his own writing and procured for him the favor of such men of letters as the earls of Southampton and Pembroke. The older editions of Shakespeare, were published in 1632, 1664, 1685; Rowe's edition in 1709, and successive editions were edited by such scientific men of letters as Pope, Theobald, Sir Thomas Hanmer, the Oxford scholar, Mr. Upton, Dr. Warburton, Capell, Stevens, Dr. Samuel Johnson, and more recently, Knight's, Dyce's, Collier's, Singer's, Clark's, and Wright's, Dowden's, Furnivall's, Swinburne's, White's, Hudson's, Furness' and Rolfe's editions have been published and very learned and scientific men in Germany, and other countries, have made a life study of the works of the immortal dramatist. Is it not strange that of this large list of scholars not one has doubted the authorship of the plays? In the face of the testimony of his contemporaries and the scientific and expert testimony of these scholars, are the doubts based upon such suggestions as Walpole's and Delia Bacon's or the existence of an imaginary cypher, or of buried documents in the River Wye, with the other similar puzzles and scepticisms, advanced on this adverse claim, to prevail? If so, then, " 'tis rigour and not law."

COMMENTARIES ON THE LAW IN SHAKESPEARE.

CHAPTER I.

"THE TEMPEST."

Sec. 1. Confiscation of property—Doing homage.
2. Witness' oath.
3. The marriage contract.

CHAPTER II.

"TWO GENTLEMEN OF VERONA."

Sec. 4. Judgment unreversed—Tendered.
5. Setting up new plea—Repealing former.

CHAPTER III.

"MERRY WIVES OF WINDSOR."

Sec. 6. Contempt of Court—Star-Chamber.—
7. Compromising slanders.
8. Right of Egress and Regress.
9. Fee-Simple, Fine and Recovery—Waste.

CHAPTER IV.

"TWELFTH NIGHT."

Sec. 10. Exceptions—Improper conduct.
11. Proof—Admission against interest.
12. Misprison.
13. Sheriff's post.
14. Misdemeanors.
15. Grand-jury.
16. Windy side of the Law.
17. Action of battery.
18. Party plaintiff.

CHAPTER V.

"MEASURE FOR MEASURE."

Sec. 19. Termes of the Law.
20. Dead Laws.
21. Custom shaping Laws.
22. Frailty of all laws—Especially jury system.
23. Action of Slander.
24. Prostitution before the Law.
25. Sentence.
26. Plea for Pardon.
27. Punishment for Seduction, by Venetian Law.
28. The severe Judge.
29. Common Law marriage contract.
30. Plea for Justice.
31. The Equality of Justice.
32. The Law a gazing-stock, when not enforced.
33. Confession of guilt.
34. Loyalty of Attorney.
35. Intent, distinguished from Wrongful Act.
36. Breach of Promise.
37. Punishment by marriage to prostitute.

CHAPTER VI.

"MUCH ADO ABOUT NOTHING."

Sec. 38. Endowment.
39. Breach of the Peace.
40. Punishment by Pressing to Death.
41. "Statutes of the Streets."
42. Qualifications of Constable.
43. Duties of the Nightwatch.
44. False Imprisonment.
45. Preliminary Hearing.
46. Examination before Magistrate.
47. Householder.
48. Preliminary Examination for Burglary.
49. Trial by Manly Combat.
50. Count—Extra-Judicial Confession.
51. False Testimony.
52. The Scales of Justice.

CHAPTER VII.

"MIDSUMMER NIGHT'S DREAM."

Sec. 53. Jurisdiction of Athenian Laws.
54. Parent and Child, under Greek Law.
55. Parent's right of Infanticide, by Athenian Law.
56. Pleading for Fee.
57. Parent's Consent to Child's Marriage.
58. Limitation of Municipal Law.

CHAPTER VIII.

"LOVE'S LABOUR'S LOST."

Sec. 59. Term—Subscribing to Oath.
60. Decrees.
61. Penalty of the Law.
62. Attainder.
63. Taken "With the Manner."
64. "In Manner and Form."
65. Venue and Offense Charged.
66. Inheritance—Dowry.
67. Duties of Solicitor.
68. Surety.
69. Title.
70. Common—Severalty.
71. Crime of Perjury.
72. Denial of Receipt.
73. Specialties—Acquittances.
74. Apparitors—Duties of.
75. Enfranchising one.
76. Treason.
77. "Quillets" of the Law.
78. Statute-caps.
78a. Slander dependent upon hearer's attitude.

CHAPTER IX.

"THE MERCHANT OF VENICE."

Sec. 79. Warranty.
80. Breach of Bond—Penalty for.
81. Sealing written instrument.
82. Extorting evidence upon the Rack.
82a. Tainted plea.

83. Usurer.
84. Plea of Forfeiture.
85. "The course of Law."
86. Bond.
87. Standing for Law.
88. Seal.
89. Moiety.
90. Charter.
91. The Issue before the Court.
92. Nature of Shylock's suit.
93. Portia's plea for Mercy.
94. Antonio's confession of the bond.
95. Plea for judgment.
96. Justice of Shylock's plea.
97. "I crave the Law."
98. Tender in open Court.
99. Effect of legal precedent.
100. Portia's judgment on the bond.
101. Commutation of punishment.
102. Conveyance in use.
103. Deed of gift.

CHAPTER X.

"AS YOU LIKE IT."

Sec. 104. Primogeniture.
105. Bequest.
106. Heir.
107. Testament.
108. "Be It Known By These Presents."
109. Bankrupt.
110. Forfeiture of land.
111. Writ *Extendi facias.*
112. Vacations of Court.
113. Jointure.
114 Acts by Attorneys.
115. Examining Justice.

CHAPTER XI.

"ALL'S WELL THAT ENDS WELL."

Sec. 116. Ward's—Heirs of fortune under King.
117. Giving testimony against one—Impeachment.
118. Premises.

119. Theft.
120. Descent.
121. Lawful Act.
122. Unlawful Intents.
123. Entailment—Remainders.
124. Evidence.
125. Divorce.

CHAPTER XII.

"THE TAMING OF THE SHREW."

Sec. 126. Third-borow.
127. Court-leet, or Manor Court.
128. Adversaries at Law.
129. Compounding crime.
130. Servant assaulting master.
131. Punishment by the Pillory.
132. Settlement by way of Assurance.
133. Chattels.
134. "Packing" a witness.

CHAPTER XIII.

"THE WINTER'S TALE."

Sec. 135. Time overthrows Law and Custom.
136. Trespass.
137. Negligence distinguished from wilfulness.
138. Prisoner's fees.
139. Not guilty.
140. King's prerogative.
141. Child born in prison.
142. Commitment to jail.
143. Arraignment of Hermione.
144. Surmises, not proof of guilt.
145. Indictment.
146. Torture by "boiling in oil".
147. Lawyer's points.
148. Arrested in act, or, "Taken with the Manner."
149. Witchcraft and practice of magical arts.

CHAPTER XIV.

"COMEDY OF ERRORS."

Sec. 150. Earnest to bind bargain.
151. Attachment.

152. Arrest.
153. Breach of Promise.
154. Arrest upon *mesne* process—Debtor's dungeon.
155. Action "on the case."
156. Subornation.
157. Prisoner.

CHAPTER XV.

"MACBETH."

Sec. 158. Estate.
159. Execution.
160. Instigation of Macbeth's crime.
161. Agent.
162. Trust, from fiduciary relation.
163. Murder.
164. Malice.
165. Copyhold.
166. Single ownership.

CHAPTER XVI.

"KING JOHN."

Sec. 167. Controversy—Judgment on.
168. Descent to eldest son.
169. Bastard's right to inheritance.
170. Child begot when father not *infra quatuor maria.*
171. Legitimacy of child born during lawful wedlock.
172. Testamentary disposition, disinheriting bastard.
173. Landed 'Squire.
174. Seduction.
175. Arbitration.
176. Usurpation—Denial of rights.
177. Equity.
178. Canon of the Law.
179. Abstract and Brief.
180. Indenture.
181. Rape.
182. Interrogatories.
183. Tithes—Toll.
184. Laws' redress of wrongs.
185. Keeping the Peace.
186. Source of Sovereign power.

CHAPTER XVII.

"KING RICHARD THE SECOND."

Sec. 187. Appellant.
188. Accuser and accused.
189. Impeachment.
190. Deposing, according to Law.
191. Trial by battle.
192. Party-verdict.
193. Reversion.
193a. Dying declarations.
194. Waste upon real estate.
195. Landlord.
196. Lease—Tenement.
197. Possessed.
198. Royalties.
199. Attorneys-General.
200. Letters-patent.
201. Seize.
202. Fine.
203. Repeal.
204. Covenant.
205. Breaking Laws.
206. Livery.
207. Attorneys.
208. Executors.
209. Failure to speak, in criminal case—Standing mute.
210. Signories.
211. Under age.
212. Day of trial.
213. Answer.
214. Crimes.
215. Manors.
216. Conspiracy.

CHAPTER XVIII.

"FIRST PART OF KING HENRY THE FOURTH."

Sec. 217. King's right to prisoners, under military Law.
218. "The Law's Delay."
219. "Peaching" on accomplice.
220. Righting Grand-jurors.
221. *Audi alteram partem.*

222. Term of apprentice.
223. Arrest upon "hue and cry."
224. Robbery.
225. Tripartite agreements.
226. Enfoeffment.
227. Alien.
228. Factor—Broker.
229. Maiming.
230. Reprisal.
231. Counterfeit.
232. Death by Judicial Sentence.

CHAPTER XIX.

"SECOND PART OF KING HENRY THE FOURTH."

233. Accomplices.
234. Assurance—Security.
235. Punishment by the stocks.
236. Infamy.
237. Laws of Land-service.
238. Action.
239. Eating flesh contrary to law.
240. "Faitors."
241. Inns of Court.
242. A "rotten case"—No Counsel in.
243. Riot.
244. "A friend i' the Court."
245. Committment for Contempt of Court.
246. Law no respector of persons.
247. Falstaff's Committment to prison.

CHAPTER XX.

"KING HENRY THE FIFTH."

Sec. 248. Seditious and insurrectionary bills.
249. Bills against Ecclesiastics.
250. Henry the Fifth's favor toward Ecclesiastics.
251. Salic Law and Henry the Fifth's Claim to France.
252. *Lex terra salica* explained.
253. Ancestor.
254. Impounding strays.
255. Departments of Government working harmoniously.
256. Adultery.

257. Capital crimes.
258. Motive for crime.
259. Money paid in earnest.
260. Divesting property rights.
261. Respondeat superior not applicable to King and subject.
262. Bearing testimony.
263. Martial Law.

CHAPTER XXI.

"FIRST PART OF KING HENRY THE SIXTH."

Sec. 264. Homicide.
265. Distraining property.
266. Proclamation.
267. Truant in the Law.
268. Brawl.
269. Outlaw.
270. Contract.
271. Partners.
272. Fighting in King's palace, or presence.
273. *Quid pro quo.*
274. Condemned woman's privilege of pregnancy.
275. Compromise.

CHAPTER XXII.

"SECOND PART OF KING HENRY THE SIXTH."

Sec. 276. Articles of agreement.
277. Bargain and sale.
278. Margery Jourdemayn's case.
279. Pursuivant.
280. Bondman.
281. Open to the Law.
282. "Rigour of the Law."
283. To apprehend in the fact.
284. York's title to the Crown of England.
285. Duchess' of Gloster's sentence.
286. Justification for one condemned by Law.
287. Contrary to form of Law.
288. Levying sums of money.
289. Taking bribes.
290. Taxes—Restitution.
291. Bearing false witness—Perjury.

292. Executioner.
293. Land held in common.
294. Sales of meat during Lent.
295. Source of Law—Biting statutes.
296. Jurisdiction regal.
297. Benefit of Clergy.
298. Determining causes.
299. Maiden-rent.
300. Bail.

CHAPTER XXIII.

"THIRD PART OF KING HENRY THE SIXTH."

Sec. 301. No inter-regnum, under English Law.
302. Title by confirmation.
303. Disinheriting heir.
304. Estate-tail, upon condition.
305. Acts of Parliament.
306. Lady Grey's suit for husband's lands.
307. Concubine.
308. Richard the Third, an embryonic criminal.
309. Richard's morbid vanity.
310. Crime the basis of Richard's character.
311. Elizabeth's plea of "Sanctuary."

CHAPTER XXIV.

"KING RICHARD THE THIRD."

Sec. 312. Richard's crimes prompted by his isolation.
312a. Ordeal of the Bier.
313. Law of God and man.
314. Acquittal of the accused.
315. Accessory before the fact.
316. Avouch.
317. Disputing with Lunatic.
318. Clothing villany with "holy writ."
319. Warrant no protection against murder.
320. Guilty conscience.
321. Reward.
322. Death without lawful conviction.
323. Divine Law against murder.
324. Benefit of "Sanctuary."
325. Moveables.
326. Bigamy.
327. Levitical Law against niece marrying uncle.

328. Richard the Third's inherited criminal instinct.
329. Demise.
330. Corrupted Justice.
331. Swords as Laws, under Richard's reign.

CHAPTER XXV.

"KING HENRY THE EIGHTH."

Sec. 332. Privity.
333. Wasting manors in military preparations.
334. Buckingham's trial for treason.
335. "Come into Court."
336. Pleading cause.
337. Session of Court.
338. Challenging prejudiced Judge.
339. Retainers.
340. Appearance in Court.
341. Under "hand and seal."
342. Motion to dismiss appeal.
343. Dilatory pleas.
344. Adjournment of Court.
345. Trial at Law.
346. Inventory.
347. Commission for office.
348. Writ of Praemunire.
349. Decree of divorce from Katherine.
350. Simony.
351. Purging one's self of guilt.
352. Verdict based on perjury.
353. Accusing one, "face to face."
354. Accusing Counsellor.
355. Acting as both Judge and Juror.
356. Crime of heresy.
357. Appeal by King's ring.

CHAPTER XXVI.

"TROILUS AND CRESSIDA."

Sec. 358. Ravishment.
359. *Per se.*
360. Justice residing between right and wrong.
361. Impressment for military service.
362. Attestation.

363. Damage and indemnity of war.
364. Law's protection of marital relation.
365. A "privileged man."
366. Underwriting one.
367. A kiss in fee farm.
368. Execution of contract by parties "interchangeably."
369. Right warring with right.
370. Consanguinity.
371. Rejoindures.
372. Attestation by "sight and hearing."

CHAPTER XXVII.

"TIMON OF ATHENS."

Sec. 373. Pawn.
374. Death penalty for homicide.
375. Joint and corporate action.
376. Hereditary taints.
377. Pity the virtue of Law.
378. Plunging into Law.
379. Defending manslaughter.
380. Killing in self-defense.
381. Felon in irons.
382. "Law is strict."
383. A cynic's view of Law—Thievery justified.
384. Bawds not competent witnesses.
385. Pleading false titles.
386. The scope of Justice.
387. Answering public Laws.

CHAPTER XXVIII.

"CORIOLANUS."

Sec. 388. Piercing statutes.
389. Manacles.
390. Alias.
391. Complaint.
392. Bencher.
393. Pleaders.
394. Tarpeian rock.
395. Resisting Law.
396. Process.
397. Death by the Wheel.
398. Trial by Comitia.

CHAPTER XXIX.

"JULIUS CAESAR."

Sec. 399. English statutes of "Laborers and Mechanics."
400. Idealism the basis of Brutus' crime.
401. Cassius the typical criminal revolutionist.
402. Cassius' suggestion of the crime.
403. Brutus' struggle with his conscience.
404. The people's cause, the motive for Brutus' murder.
405. "The Law of children."
406. "The King can do no wrong."
407. Caesar's will.
408. The effect of error.
409. Antony's tribute to Brutus' character.

CHAPTER XXX.

"ANTONY AND CLEOPATRA."

Sec. 410. Bourn.
411. Leaving property in use.
412. Title by descent and purchase, distinguished.
413. Prorogue.
414. Malefactor.
415. Antony's suicide—*Felo de se.*

CHAPTER XXXI.

"CYMBELINE."

Sec. 416. Election to act in given way.
417. Advocate.
418. Condition of wager contract.
419. Lawyer's duty to understand case.
420. Witness to action.
421. Forfeiters.
422. Frankleyn.
423. Debtor overpassing bound.
424. Demesne lands.
425. Guiderius' defense of his crime.
426. Upright Justice.

CHAPTER XXXII.

"TITUS ANDRONICUS."

Sec. 427. Encroachment upon Prince's right.
428. Proof of facts apparent.
429. Bail in Criminal Case.
430. Invoking Justice from heaven.
431. The Goddess of Justice abandoning the Earth.
432. Libeling the Senate.
433. Prosecution for Contempt.
434. Lawful killing not murder.

CHAPTER XXXIII.

"PERICLES, PRINCE OF TYRE."

Sec. 435. Incest.
436. Development of criminal instinct.
437. Bill of Lading.
438. Poor man's right in Law.
439. A litigious peace.
440. Serving clients.
441. Applying judgment to the Judge.
442. Modesty of Justice.

CHAPTER XXXIV.

"KING LEAR."

Sec. 443. Divesting property.
444. Entailment of estate.
445. Reservation, in grant.
446. Parricide.
447. Identifying criminals by pictures.
448. An "action-taking" knave.
449. Crimes unwhipped by Justice.
450. Summoners.
451. "Whipped from tithing to tithing."
452. Imaginary trial of Goneril.
453. Equal rank in Trial by Battle.

CHAPTER XXXV.

"ROMEO AND JULIET."

Sec. 454. Bond to Keep the Peace.
455. Wife's legal status.
456. Sale of Life Tenure.
457. Amercement by fine.
458. Murder to kill murderer illegally.
459. Tybalt's death murder at Romeo's hands.
460. No slander to speak the truth.
461. Label appended to deed.
462. Sale of poison contrary to Italian Law.
463. Purging impeachment.

CHAPTER XXXVI.

"HAMLET, PRINCE OF DENMARK."

Sec. 464. Law and Heraldry.
465. Trespass *vi et armis*.
466. Forgeries.
467. Appurtenances.
468. Detecting crime.
469. *Quietus*.
470. Fratricide.
471. No corrupted Justice above—Evidence by interested party.
472. Counselor.
473. Pleas in Abatement.
474. "Crowners-quest Law."
475. Hamlet's legal comments on the skull.
476. Hamlet's survivorship and disposal of the Crown.

CHAPTER XXXVII.

"OTHELLO, THE MOOR OF VENICE."

Sec. 477. Non-suit.
478. Duke's promise to redress Brabantio's wrong.
479. Proof required of Desdemona's seduction.
480. Othello's election to stand upon Desdemona's evidence.
481. Sequestration against Desdemona.

482. Iago the cynic anti-pathetic criminal.
483. Law days of Courts of Inquiry.
484. Iago's crime against Othello.
485. Proof of guilt "beyond reasonable doubt."
486. False indictment on suborned testimony.

CHAPTER XXXVIII.

"VENUS AND ADONIS."

Sec. 487. Judge cannot right his own cause.
488. Law-giver unable to enforce Law.
489. Client wrecked, when attorney mute.
490. Conveyance by seal-manual.
491. Double penalty upon broken bond.
492. Inheritance by next of blood.

CHAPTER XXXIX.

"THE RAPE OF LUCRECE."

Sec. 493. Loving against Law and Duty.
494. Pleading for right, in wilderness without Law.
495. Holy human Law.
496. Attestation by Notary.
497. The assault upon Lucrece.
498. Opportunity spurns Right and Law.
499. Justice feasting, while widow weeps.
500. Errors by opinion bred.
501. Wronger wronged by Time.
502. Case past help of Law.
503. Rightful plea for Justice—Denial of.

CHAPTER XL.

"SONNETS."

Sec. 504. Determination of lease.
505. Improper to praise by hearsay.
506. Adverse party for advocate.
507. Trial between Eye and Heart—Jury of Heart's tenants.
508. No cause alleged against lawful reason.
509. Grant failing for want of consideration.
510. Forfeiture of limited lease.
511. Forfeiting mortgaged property.

CHAPTER I.

"THE TEMPEST."

Sec. 1. Confiscation of property—Doing homage.
2. Witness' oath.
3. The marriage contract.

Sec. 1. Confiscation of Property—Doing Homage.

"*Pro.* This King of Naples, being an enemy to me inveterate, hearkens my brother's suit;
Which was that he, in lieu o' the premises, of homage and I know not how much tribute,—
Should presently extirpate me and mine out of the dukedom; and confer fair Milan, with all the honors, on my brother."[1]

This language is used to show a consideration for the confiscation of the estate of the speaker.

"In lieu o' the premises," are terms indicative of the common meaning of a *quid pro quo.* "Lieu" is here used in the sense of *instead* or *in place of.* That is, the scheme of confiscation had been adopted *in lieu of* the plan of extortion and extortion was the consideration for the judgment of confiscation.

Homage, in *feudal law,* was the rendition of submission and service by the tenant to the lord or superior, when first admitted to the land which he held of him, in fee. In other words, when invested with the fee, the tenant rendered homage to the Lord. The tenant was ungirth and uncovered and he kneeled and held up both hands between those of the lord, and professed that "he did become his man, from that day forth, of life and limb and earthly honor." After this profession he received a kiss from the lord paramount and the ceremony of doing *homage* was then ended.[2]

---

[1] Tempest, Act I, Scene II.

[2] Blackstone's Com. 87; Tiedeman's Real Prop. (3d Ed.) Ch. III. The word "lieu" is also used, in Love's Labour's Lost (Act III, Scene I) in the following sense: "*Arm.* I give thee thy liberty, set

thee from durance, and, *in lieu* thereof, impose on thee nothing but this."

In Merchant of Venice (Act IV, Scene I) after acknowledgment of his obligations to Portia, for the acquittance from the Jew, Bassanio "*in lieu*" thereof tendered the three thousand ducats to Portia.

In Comedy of Errors, the Merchant advises Antipholus: "Therefore, give out you are of Epidamnum, Lest that your goods too soon be confiscate." (Act I, Scene II.)

In rendering homage to King Henry VI, Richard Plantagenet said: "*Plan.* Thy humble servant vows obedience and humble service, till the point of death." And the King said: "*K. Hen.* Stoop then, and set your knee against my foot; And in reguerdan of that duty done, I gird thee with the valiant sword of York: Rise, Richard, like a true Plantagenet; And rise created princely duke of York." (Act III, Scene I.)

Charles, Dauphin of France, and his nobles, swear allegiance to the crown of England, in 1' Henry VI, as follows:

"*York.* Then swear allegiance to his majesty;
As thou art knight, never to disobey,
Nor be rebellious to the crown of England,
Thou nor thy nobles, to the crown of England." (Act V, Scene IV.)

King Henry VI, in 2' Henry VI, knights Alexander Iden, for killing Cade, in this language: "*K. Hen.* . .Iden, kneel down. (He kneels.) Rise up a knight. We give thee for reward a thousand marks; And will, that thou henceforth attend on us." (Act V, Scene I.)

The king thus knights his son, in 3' Henry VI: "*Q. Mar.* . . . You promised knighthood to our forward son; Unsheathe your sword, and dub him, presently.—Edward, kneel down.

K. Hen. Edward Plantagenet, arise a knight; And learn this lesson, draw thy sword in right.

Prince. My gracious father, by your kingly leave, I'll draw it as apparent to the crown, And in that quarrel use it to the death." (Act II, Scene II.)

Warwick tells Clarence, in 3' Henry VI: "*War.* . . now then it is more than needful, Forthwith that Edward be pronounced a traitor, And all his lands and goods be confiscate." (Act IV, Scene VI.)

Belarius tells Cymbeline:

"First pay me for the nursing of thy sons; And let it be confiscate all, so soon as I have received it." (Act V, Scene V.)

Sec. 2. Witness oath.—

"*Cal.* I'll swear upon that bottle to be thy true subject. for the liquor is not earthly.
Ste. Here; swear then, how thou escap'dst.
Trin. Swam a-shore, man, like a duck; I can swim like a duck, I'll be sworn. . . .
Ste. Come, swear to that; kiss the book; I will furnish it anon, with new contents: swear."[1]

The most common form of oath, by the use of the gospel, is that here adopted. This form of oath obtains in countries subject to the English and Roman law. The witness took the book in his hand and then assented to the words: "You do swear that," etc., "so help you, God," and then kissed the book.[2] The origin of this form of oath may be traced to the Roman law.[3] Kissing the book is perhaps an imitation of the priest's kissing the ritual, as a sign of reverence before reading it to the congregation.[4]

That the central idea of the oath was thoroughly understood by the Poet is apparent from the language used, for an oath is but an outward pledge that the witness makes his attestation under an immediate sense of his responsibility to God and promises to accomplish the transaction to which it refers, according to His laws.[5]

---

[1] Tempest, Act II, Scene II.
[2] 9 Carr & P., 137.
[3] Nov. 8, Tit. 3; Nov. 124, cap. 1.
[4] Rees, Cycl.
[5] Tyler, Oaths, 15.

The Jew is sworn on the Pentateuch, or Old Testament, with his head covered. Strange, 821, 1113. The Mohammedan, on the Koran, 1 Leach, Cr. Cas. 54. The Brahmin, by touching the hand of a priest, Wils. 549.

In Love's Labour's Lost, the Poet justifies a false oath, as follows:

"*Biron.* Let us once lose our oaths, to find ourselves,
Or else we lose ourselves to keep our oaths;
It is religion to be thus forsworn;
For charity itself fulfills the law;
And who can sever love from charity." (Act IV, Scene III.)

In Merchant of Venice (Act II, Scene II), the oath, by swearing on the book, is again spoken of, as follows: "*Laun.* Father, in:—I cannot get a service, no:—I have ne'er a tongue in my head.—Well; (*looking on his palm*) if any man in Italy have a fairer table, which doth offer to swear upon a book.—I shall have good fortune," etc. And Shylock said: "An oath, an oath. I have an oath in heaven: Shall I lay perjury upon my soul? No, not for Venice." (Act IV, Scene I.)

In All's Well That Ends Well, (Act IV, Scene II) the Poet makes Diana say: "*Dia.* 'Tis not the many oaths that makes the truth;
But the plain single oath, that is vow'd true.
What is not holy, that we swear not by; but take the highest to witness."

In Winter's Tale, the messengers from Apollo's priest, took the following oath:
"*Offi.* You here shall swear upon this sword of justice,
That you, Cleomenes and Dion, have been both at Delphos;
And from thence have brought this seal'd-up oracle,
By the hand deliver'd of great Apollo's priest; and that,
Since then, you have not dar'd to break the holy seal,
Nor read the secrets in't.
Cleo. Dion. All this we swear." (Act III, Scene II.)

On pronouncing their banishment, King Richard II exacts the following oath from Bolingbroke and Norfolk:
"*K. Rich.* Return again, and take an oath with thee.
Lay on our royal sword your banish'd hands;
Swear by the duty that you owe to heaven,
(Our part herein we banish, with ourselves,)
To keep the oath that we administer:—
You never shall (so help you truth and heaven:)
Embrace each other's love in banishment;
Nor never look upon each other's face;
Nor never write, regreet, nor reconcile
This lowering tempest of your home-bred hate;
Nor never by advised purpose meet,
To plot, contrive, or complot any ill.
'Gainst us, our state, our subjects or our land.
Boling. I swear.
Nor. And I, to keep all this." (Act I, Scene III).

In 1' Henry IV, Francis said to Prince Henry: "*Fran.* O lord,

sir; I'll be sworn upon all the books in England, I could find in my heart." (Act II, Scene IV.)

The Poet makes Falstaff say to Bardolph, in 1' Henry IV: "*Fal.* . . . If thou wert any way given to virtue, I would swear by thy face; my oath should be, By this fire." (Act III, Scene III.)

Hostess Quickly, in 2' Henry IV (Act II, Scene II), puts Falstaff upon his oath, as follows: "*Host.* Thou did'st swear to me upon a parcel-gilt goblet, sitting in my Dolphin chamber, at the round table, by a sea-coal fire, upon Wednesday, in Whitsun week, when the Prince broke thy head for liking his father to a singing man of Windsor, thou did'st swear to me then, as I was washing thy wound, to marry me and make me my lady thy wife. Can'st thou deny it? . . . And did'st thou not kiss me and bid me fetch thee thirty shillings? I put thee now to thy book-oath; deny it, if thou can'st."

Pistol, enraged at corporal Nym, comes quite near taking an oath, in Henry V, as follows: "*Pist.* Base tike, call'st thou me—host? Now, by this hand I swear, I scorn the term; nor shall my Nell keep lodgers. (Act II, Scene I.)

And in attempting to part the combatants, Bardolph said: "*Bard.* By this sword, he that makes the first thrust, I'll kill him; by this sword, I will." And Pistol replies: "*Pist.* Sword is an oath, and oaths must have their course." (Act II, Scene I.)

In 2' Henry VI, the earl of Salisbury, thus abjures his oath of allegiance to the King:

"*Hen.* Hast thou not sworn allegiance unto me?
Sal. I have.
Hen. Can'st thou dispense with heaven for such an oath?
Sal. It is great sin, to swear unto a sin;
But greater sin, to keep a sinful oath.
Who can be bound by any solemn vow
To do a murderous deed, to rob a man.
To force a spotless virgin's chastity,
To reave the orphan of his patrimony,
To wring the widow from her custom'd right;
And have no other reason for this wrong,
But that he was bound by a solemn oath?"

(Act V, Scene I.)

Richard thus reasons that a non-official oath is without effect, in 3' Henry VI:

"*Rich.* An oath is of no moment being not took,
Before a true and lawful magistrate,

That hath authority over him that swears;
Henry had none, but did usurp the place;
Then seeing 'twas he that made you to depose,
Your oath, my lord, is vain and frivolous."
(Act I, Scene II.)

Clarence thus excuses his violation of his oath in 3' Henry VI:

"*Clar.* Perhaps, thou wilt object my holy oath,
To keep that oath were more impiety,
Than Jeptha's, when he sacrificed his daughter." (Act V, Scene I.)

In his attempt to woo the daughter of Queen Elizabeth, his own niece, King Richard III swears as follows:

"*K. Rich.* . . . Now, by my George, my garter and my crown,—
Q. Eliz. Profan'd, dishonored and the third usurp'd.
K. Rich. I swear.
Q. Eliz. By nothing; for this is no oath.
Thy George, profan'd, hath lost its holy honour;
Thy garter, blemish'd, pawn'd his knightly virtue;
Thy crown usurp'd, disgrac'd his kingly glory;
If something thou would'st swear to be believ'd,
Swear then by something that thou hast not wrong'd."
(Act IV, Scene IV.)

Lucius thus swears to perform his promise to Aaron, in Titus Andronicus:

"*Luc.* Even by my God, I swear to thee, I will."
(Act V, Scene I.)

And Hamlet and the Ghost insist upon Horatio and Marcellus being sworn, as follows:

"*Ham.* . . . consent to swear.
Hor. Propose the oath, my lord.
Ham. Never to speak of this that you have seen.
Swear by my sword.
Ghost. (Beneath) Swear.
Ham. *Hic et ubique?* then we'll shift our ground:—
Come hither, gentlemen,
And lay your hands upon my sword:
Swear by my sword.
Never to speak of this that you have heard.
Ghost. (Beneath.) Swear by his sword." (Act I, Scene V.)

Sec. 3. The marriage contract—

"*Pro.* If thou dost break her virgin knot before all sanctimonious ceremonies may, with full and holy rite be ministered,
No sweet aspersion shall the heavens let fall to make this contract grow."[1]

To guarantee deliberation and preserve the positive evidence of such an important transaction, the laws of most civilized countries require certain forms in the celebration of the marriage ceremony.[2] In one form or another marriage is the oldest institution of society and the source of its most antique laws. At the basis of the marriage celebration is the necessity of society for some rule for the appropriation of the opposite sexes to one another and the protection of the relation established.[3] The higher the standards of civilization, no doubt the greater regard is paid to the established ceremonies through which the marriage is celebrated. Hence the suggestion, by the poet that "No sweet aspersion shall the heavens let fall, to make this contract grow," until "all sanctimonious ceremonies may, with full and holy rite, be ministered." In all Christian countries, the marriage contract is celebrated by the accompaniment of a religious ceremony.[4] Hildebrand declared marriage to be a sacrament of the church; Calvin declared it to be an institution of God, while Grotius defined it as a contract of partnership. The legal idea of the marriage ceremony is presented in the above verse, as well as the recognition of the institution from a spiritual standpoint, for in legal contemplation, even where the intervention of the priest is essential, on grounds of public policy, marriage is nothing more nor less than a civil contract, differing from other contracts in that its incidents are fixed by public law and in so far as it affects the status of the contracting parties.[5]

[1] Tempest, Act IV, Scene I.
[2] McLennan, Prim. Mar.
[3] Lubbock's Origin of Civilization; Tylor Early History of Mankind.
[4] Bishop's Marriage and Divorce.
[5] Bishop's Marriage and Divorce.

For the effect of marriage contracts and espousals, both in the civil courts and ecclesiastic courts of Europe, see, 6' Bacon's Abr., pp. 454, 500.

There is perhaps no legal subject to which Shakespeare makes more frequent reference than he does to that of marriages. Marriage ceremonies are presented in many of the different plays.

That the recognition of the marriage contract as both a spiritual institution and a legal contract, was appreciated by the Poet, will be apparent from a reading of his plays, where this theme is touched on. Thus, he makes Olivia say to Sebastian: "*Oli.* Now go with me and with this holy man, Into the chantry by: there, before him, And underneath that consecrated roof, Plight me the full assurance of your faith." (Twelfth Night, Act IV, Scene III.)

And again, the Priest details this ceremony: "*Priest.* A contract of eternal bond of love, confirmed by mutual joinder of your hands, Attested by the holy close of lips, Strengthened by interchangement of your rings; And all the ceremony of this compact, Sealed in my function, by my testimony." (Twelfth Night, Act V, Scene I.)

In As You Like It (Act III, Scene III), The Vicar, Sir Oliver Martext, observed:
"Truly, she must be given, or the marriage is not lawful."

And in the marriage contract between Blanch and Lewis, Dauphin of France, the following occurs: "*K. John.* . . Phillip of France, if thou be pleased withal, Command thy son and daughter to join hands. *K. Phi.* It likes us well:—Young princes, close your hands." (King John, Act II, Scene I.)

And the following, from As You Like It:
"*Ros.* Come, sister, you shall be the priest and marry us.—
Give me your hand, Orlando:—What do you say, sister?
Orl. Pray thee, marry us.
Cel. I cannot say the words.
Ros. You must begin,—*Will you, Orlando,*—
Cel. Go to:—Will you, Orlando, have to wife, this Rosalind?
Orl. I will.
Ros. Ay, but when?
Orl. Why now, as fast as she can marry us.
Ros. Then you must say,—*I take thee Rosalind, for wife.*
Orl. I take thee, Rosalind, for wife.
Ros. I might ask you for your commission: but—I do take thee, Orlando, for my husband." (Act IV, Scene I.)

And in the song, by the representative of Hymen, in the same play, the sentiment is expressed as follows: "Wedding is great Juno's crown; O blessed bond, of board and bed." (Act V, Scene IV.) This is based on the legal expression, used in divorces from the bed and board, i. e., *mensa et thora*, to distinguish divorces from the bonds of matrimony, or those *a vinculo matrimona*.

In All's Well That Ends Well, the following occurs: "*King.* Good fortune and the favor of the king smile upon this contract; whose ceremony shall seem expedient on the now-born brief and be performed to-night." (Act II, Scene III.)

Queen Isabel, of France, congratulated and blessed the union of Henry V and Katharina, as follows:

"*Q. Isa.* God, the best maker of all marriages,
Combine your hearts in one, your realms in one.
As man and wife, being two, are one in love,
So be there 'twixt your kingdoms such a spousal,
That never may ill office, or fell jealousy,
Which troubles oft the bed of blessed marriages,
Thrust in between the paction of these kingdoms,
To make divorce of their incorporate league."

(Henry V, Act V, Scene II.)

Warwick and Queen Margaret contract to marry the Prince to the former's daughter, in 3' Henry VI, as follows: "*War.* . . . if our queen and this young prince agree, I'll join mine eldest daughter and my joy, To him forthwith, in holy wedlock bonds.

Q. Mar. Yes, I agree and thank you for your motion:—Son Edward, she is fair and virtuous, Therefore delay not, give thy hand to Warwick; And, with thy hand, thy faith irrevocable, That only Warwick's daughter shall be thine.

Prince. Yes, I accept her, for she well deserves it; And here, to pledge my vow, I give my hand." (Act III, Scene III.)

Speaking of his contemplated union with Elizabeth, Richmond said in King Richard III:

"*Richm.* . . O, now, let Richmond and Elizabeth.
The true succeeders of each royal house,
By God's fair ordinance conjoin together."

(Act V, Scene IV.)

CHAPTER II.

"TWO GENTLEMEN OF VERONA."

Sec. 4. Judgment unreversed—Tendered.
5. Setting up new plea—Repealing former.

Sec. 4. Judgment unreversed—Tendered—

"*Pro.* Ay, ay; and she hath offered to the doom, which (*unreversed*) stands in effectual force, A sea of melting pearl, which some call tears, Those at her father's churlish feet, she tendered."[1]

That the word "doom" in the verse quoted, is used in the sense of judgment, is apparent from the subject matter and scope of the context. A judgment "unreversed" is one not annulled or set aside by the decision of a higher or superior court, possessing power, on appeal or writ of error to set aside or annull the judgment, sentence or decree of an inferior court.[2] Until reversed, a judgment is, of course "in effectual force" and all the remedies of the owner can be taken advantage of. The use of the terms in the way they are used, shows an accurate and proper knowledge of the remedial procedure of the English Courts.

Tender, from the Latin *tendere*, to extend or offer, is something delivered or offered under such circumstances as to require no further act on the part of the party making the tender, to end the controversy.[3] The thought is, that the tears were tendered as all that remained to be offered, in the hope that they would reverse the judgment or decree of banishment or exile.

---

[1] Two Gentlemen of Verona, Act III, Scene I.

[2] 9 Carr & P. 513; Bouvier, Law Dict.

[3] Bouvier, Law Dict.

King Edward, in Richard III, asks as to Clarence's death: "*K. Edw.* Is Clarence dead? the order was revers'd." (Act II, Scene I.)

Sec. 5. Setting up new plea.—Repealing former—

"*Duke.* . . . Know then, I here forget all former griefs,
Cancel all grudge, repeal thee home again.
Plead a new state, in thy unrivall'd merit,
To which I thus subscribe."[1]

The Duke, in these lines, suggests to Valentine that he will cancel his banishment and repeal the judgment of banishment, and that if he will file a new plea, based upon his unrivalled merit, he himself will recognize it and this will give it validity, for possessing the power and authority to sustain or reject the plea offered, the Duke's assurance is a practical affirmance of the validity of the plea suggested.[2]

---

[1] Two Gentlemen of Verona, Act V, Scene IV.

[2] See Rolfe's Two Gentlemen of Verona, p. 185, notes.

Tarquin is made to reflect, in The Rape of Lucrece: "Why hunt I then for color or excuses? All orators are dumb when beauty pleadeth." (267, 268.)

CHAPTER III.

"MERRY WIVES OF WINDSOR."

Sec. 6 Contempt of Court—Star-Chamber.
7. Compromising slanders.
8. Right of Egress and Regress.
9. Fee-Simple—Fine and Recovery—Waste.

Sec. 6. Contempt of Court—Star-Chamber.—

"*Shal.* Sir Hugh, persuade me not; I will make a star-chamber matter of it; if he were twenty Sir John Falstaffs, he shall not abuse Robert Shallow, Esquire.
Slen. In the county of Gloster, justice of peace and *Coram.*
Shal. Ay, cousin Slender, and *Custalorum.*
Slen. Ay, and *Ratolorum,* too; and a gentleman born, master parson, who writes himself *Armigero;* in any bill, warrant, quittance, or obligation, *Armigero.*"[1]

This verse is tantamount to a declaration to proceed in a summary way, against the offender, for a contempt of the authority of the speaker. The court of Star-Chamber—named no doubt because of the stars which studded the roof of the place where the court was originally held,[2] was composed of divers spiritual and temporal Lords, who were members of the privy council, and two common law judges.[3] This court assumed jurisdiction in contempt proceedings and its jurisdiction extended originally to riots, misbehaviors of officers and other misdemeanors. It always acted in a summary manner and without a jury,[4] hence the threat, to inflict summary punishment, by the medium of such a proceeding, which had become very odious to the people of England.[5]

---

[1] Merry Wives of Windsor, Act I, Scene I.
[2] Coke, 4th Inst, 66.
[3] 3 Hen. VII, c. 1 and 21 Hen. VIII, c. 20.
[4] Hudson, Court Star Chamber; 4 Bl. Com. 266.
[5] 16 Car. I. c. 10.

Coram, means before, and by the writ *coram vobis*[1] or *coram nobis*,[2] from the King's bench, the record was brought before *you*, or before *us*, as the case might be, for the inspection of the King's Justices. Of course the writ had no application to such inferior courts as those of justices of the peace.

Custos Rotulorum, meant Keeper of the Rolls; was the principal justice of the peace of a county and the custodian of the records.[3]

An *Armiger* was an armor-bearer, or Esquire, and the term was applied as a title of dignity to gentlemen bearing the arms.[4]

Sec. 7. Compromising slanders.—

"*Evans.* . . . If Sir John Falstaff have committed disparagements unto you, I am of the church and will be glad to do my benevolence to make atonements and compremises between you."[5]

Pope changes the word as used in the above lines to "compromises," but it is probable that the Poet intended the word to be used as a blunder, as it is printed.[6] The

---

[1] Bl. Com. 406, note.

[2] 1 Archbold Pr. 234.

[3] 1 Bl. Com. 349; 4 Bl. Com. 272; 3 Stephen, Com. 37.

[4] Bouvier's Law. Dict.

In 2' Henry IV, in speaking of the contempt committed upon the person of the Chief Justice, by the Prince of Wales, the Chief Justice said:

"*Ch. Jus.* . . in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king, whom I presented,
And struck me in my very seat of judgment."
(Act V, Scene II.)

Saturninus, in Titus Andronicus, thus delivers himself: "*Sat.* Was ever seen, an emperor of Rome, thus o'er borne, Troubled, confronted thus: and, for the extent of equal justice, us'd in such contempt?" (Act IV, Scene IV.)

[5] Merry Wives of Windsor, Act I, Scene I.

[6] Rolfe's Merry Wives of Windsor, 149, notes.

thought is, that the Parson, as an act of benevolence or charity, on his part, will use his good offices to bring about a settlement between Shallow and Falstaff of all differences growing out of Falstaff's slandering the former. A compromise, is a legal contract whereby two parties by a mutual understanding settle and adjust a difference between themselves.[1]

Sec. 8. Right of Egress and Regress.—

"*Host.* My hand, bully; thou shalt have egress and regress; said I well; and thy name shall be Brook."[2]

This was a promise of the right to go out and return, vouchsafed to one holding, by covenant, the right of egress and regress, at common law.

The right guaranteed by the use of the words, *ingress, egress and regress,* in common law leases of real property or of the mines or precious metals therein, preserved to the lessee the privilege of entering, going upon and returning from the lands demised in the lease.[3] The words usually employed are ingress and egress, meaning the right to enter upon and go from the lands conveyed.[4] The use of the words, in the sense used in the above verse, however, is not inappropriate, as they embrace the right to go from, as well as to return upon the premises.

---

[1] Lawson on Contracts (3d ed.).

[2] Merry Wives of Windsor, Act II, Scene I.

[3] Bouvier, Law Dict., Atk. Conv.

[4] White, Mines and Mining Remedies, Sec. 124. Without a special reservation of the right of ingress and egress, in a lease of minerals, in land, this easement attaches as a necessary incident of the demise and the lessee would have a reasonable use of the surface and subsoil, as well as a right to enter upon and leave the premises to extract the minerals. Such easements would be held to be but incidental to the express grant in the lease. White, Mines & Mining Remedies, Sec. 124, p. 171. The duty of providing safe means of ingress and egress to and from mines, is held to be imposed by operation of law, on the employer operating a mine and by many states in the United States, now, statutes have been passed on this subject. White, Personal Injuries in Mines, Sec. 27 and citations.

Sec. 9. **Fee-simple—Fine and Recovery—Waste.—**

"*Mrs. Page.* The spirit of wantonness is, sure scared out of him; if the devil have him not in fee-simple, with fine and recovery, he will never, I think, in the way of waste, attempt us again."[1]

The thought here expressed is, that unless the devil himself owned Falstaff, by the highest estate known to the law, by acknowledgment of record, in court, his punishment had been sufficient to prevent, or dissuade him from his desire to commit further spoilation. A fee simple estate is defined to be "a freehold estate of inheritance, free from conditions and of indefinite duration."[2] It is the highest estate known to the law and is absolute, so far as it is possible for one to possess an absolute right of property in lands.[3]

The common law proceeding by fine and recovery was an amicable proceeding in court, by which one of the parties litigant, acknowledged, of record, that the lands in controversy belonged absolutely to the other.[4]

Waste is any unlawful act of spoilation or destruction done or permitted to lands or other corporeal hereditaments, to the prejudice of the reversioner or lawful owner.[5] It may consist in either diminishing its value, in increasing its burdens, or in destroying or changing the evidences of title to the inheritance.[6] Regarding the object of his passion, as the inheritance of her husband, it can not well be doubted that if Falstaff had accomplished his purpose, the value of such "inheritance" would have been correspondingly diminished; her burdens increased and the rights of the husband violated.

[1] Merry Wives of Windsor, Act IV, Scene II.

[2] Tiedeman, R. P. (3d ed.) 29; 2 Bl. Com. 106; 1 Preston, Est. 420; 1 Washburn, R. P. 51; Litt. Sec. 1.

[3] Tiedeman, R. P. (3' ed.) Sec. 29; Plowd. 557; Atk. Conv. 183; 2 Bl. Com. 106.

[4] Bacon, Abr. Fine & Recoveries; Coke, Litt. 120; 2 Bl. Com. 349.

[5] Tiedeman, R. P. (3' ed.) Sec. 60; 4 Kent's Comm. 316; Coke, Litt. 53b; Bacon, Abr. Waste; 2 Rolle, Abr. 817.

[6] 2 Bl. Com. 281; Huntley vs. Russell, 13 Q. B. 588.

In Comedy of Errors, the following colloquy occurs between Dromio and Antipholus: "*Dro.*.. There's no time for a man to recover his hair, that grows bald by nature.

Ant. May he not do it by fine and recovery?

Dro. Yes, to pay a fine for a peruke, and recover the lost hair of another man." (Act II, Scene II.)

Commenting on this verse, Mr. Cushman K. Davis, in his "Law in Shakespeare," has this to say: "This is a lawyer's pun and would never have occurred to anyone but a lawyer. There is also here a very abstruse quibble in the use of the words, 'recover the lost hair of another man,' for the effect of a fine and recovery was to bar not only the heirs upon whom the lands were entailed, but all the world." Davis' Law in Shakespeare (2nd ed.), p. 133.

In King John (Act II, Scene I), Constance said to Elinor: "Draw those heaven-moving pearls from his poor eyes; which heaven shall take in nature of a fee."

In Troilus and Cressida, Thersites speaks of the *Fee-simple of the tetter*, as follows:

"*Ther.* . . incurable bond-ache, and the rivalled fee-simple of the tetter; take and take again, such preposterous discoveries."

In delivering his curse upon Patroclus, Thersites intimates that he has the "tetter," or a disease of the skin, for life and as a hereditament, to transmit to his posterity, if he has any. In other words, he has such disease by the highest and best title, i. e., by a fee-simple holding. (Act V, Scene I.)

In Romeo and Juliet, Benvolio and Mercutio speak of the fee-simple of the former's life, as follows: "*Ben.* An I were so apt to quarrel as thou art, any man should buy the fee-simple of my life, for an hour and a quarter.

Mer. The fee-simple. O simple." (Act III, Scene I.)

Kent advises the King, in King Lear: "Kill thy physician, and the fee bestow upon the foul disease." (Act I, Scene I.)

The Captain tells Hamlet, in referring to the war to recover the land of Fortinbras:

"*Cap.* We go to gain a little patch of ground,
That hath in it no profit but the name.
To pay five ducats, five, I would not farm it;
Nor will it yield to Norway, or the Pole,
A ranker rate, should it be sold in fee."

(Act IV, Scene IV.)

The maid described how she had given her lover the best she had, in A Lover's Complaint:

"My woeful self, that did in freedom stand,
And was my own fee-simple, not in part,
What with his art in youth and youth in art,
Threw my affections in his charmed power,
Reserved the stalk and gave him all my flower."

(143, 147.)

CHAPTER IV.

"TWELFTH NIGHT."

Sec. 10. Exceptions—Improper conduct.
11. Proof—Admission against interest.
12. Misprison.
13. Sheriff's post.
14. Misdemeanors.
15. Grand-jury.
16. Windy side of the law.
17. Action of battery.
18. Party plaintiff.

Sec. 10. Exceptions—Improper conduct.—

"Mar. By troth, Sir Toby, you must come in earlier o' nights; your cousin, my lady, takes great exceptions to your ill hours.

Sir To. Why, let her except, before excepted.

Mar. Ay, but you must confine yourself within the modest limits of order."[1]

This verse refers to the method of trial adopted to preserve the errors of the trial court, for the review of the higher court. As errors occur— or a litigant fails to confine himself "within the modest limits of order," an exception is noted on the records of the trial court, and, at the conclusion of the trial, or within a time fixed by the court, these various errors are presented and signed by the trial judge, as a bill of exceptions, upon which the errors of the trial court are reviewed on appeal.[2] Bills of exception were authorized by Statute[3] in England, in an early day and the practice obtains in the United States to the present day.

---

[1] Twelfth Night, Act I, Scene III.

[2] 8 East 280; Bouvier, Law Dict.

[3] Westm. 2nd (13 Edw. 1) c. 31.

Iago tells Roderigo, in Othello: "Give me thy hand, Roderigo: Thou hast taken against me, a most just exception; but, yet I protest, I have dealt most directly in thy affair." (Act IV, Scene II.(

Sec. 11. Proof—Admission against interest.—

"*Oli.* Make your proof.

Clo. I must catechise you for it, madonna; good my mouse of virtue, answer me.

Oli. Well, sir, for want of other idleness, I'll 'bide your proof.

Clo. Good madonna, why mourn'st thou?

Oli. Good fool, for my brother's death.

Clo. I think, his soul is in hell, madonna.

Oli. I know his soul is in heaven, fool.

Clo. The more fool you, madonna, to mourn for your brother's soul, being in heaven.—Take away the fool, gentlemen."[1]

The proof by which the clown here establishes the fact attempted to be proven is by that method of proof known as securing an admission against interest. To prove a fact is to determine or establish, by competent evidence, that such fact exists or does not exist.[2] The proof adduced here comports to the proper method of establishing a fact in a court of justice, for after the premise and argument of the fact to be established, the strongest proof is the admission against interest, for this kind of proof, because it is against the interest of the party making the admission, carries the strongest probative force.[3] After admitting that her brother's soul was in heaven, the conclusion is drawn that none but a food, would mourn, and thus the fact is established that the mistress is a fool, by her own admission.

[1] Twelfth Night, Act I, Scene V.

[2] Ayliffe, Parerg. 442; Greenl. Evid.

[3] Greenl. Evid.

Flavius, on his return to Timon of Athens, with no funds, said to his lord, by way of further assurance of his failure to borrow of his friends: "*Flav.* If you suspect my husbandry, or falsehood, Call me before the exactest auditors, And set me on the proof." (Act II, Scene II.)

After he had been poisoned against his wife, by Iago, Othello tells him: "By the world, I think my wife be honest, and think she is not; I think that thou art just, and think thou art not; I'll have some proof." (Act III, Scene III.)

Sec. 12. Misprison.—

"*Clo.* Misprison in the highest degree;—Lady, *cucullus non facit manachum;* that's as much as to say, I wear not motley in my brain. Good madonna, give me leave to prove you a fool?"[1]

Misprison is a term used in the criminal law to signify all misdemeanors, not given some particular name by the law creating the offense.[2] Misprisons are either negative, as where the commission of a crime is concealed,[3] or positive misprison, which is the commission of an offense not otherwise catalogued.[4] Misprisons positive are also denominated contempts or high misprisons,[5] as referred to in this verse.

---

[1] Twelfth Night, Act I, Scene V.

[2] Coke, 3d Inst, 36.

[3] 1 East Pl. Cr. 139; 1 Russell, Crimes, 43.

[4] Bl. Com. 9.

[5] 4 Bl. Com. 126.

The term, "misprison," as one most familiar to the Poet, is used in various places to indicate an offense, not otherwise classified, as at law. Thus:

"*Obe.* What hast thou done? thou hast mistaken quite
And laid the love-juice on some true-love's sight;
Of thy *misprison* must perforce ensue,
Some true-love turned, and not a false turn'd true."
(Midsummer Night's Dream, Act III, Scene II.)

"Misprison" is also used in Love's Labour's Lost, in the following couplet:

"*Biron.* A fever in your blood, why, then incision,
Would let her out in saucers; Sweet misprison."
(Act IV, Scene III.)

The Earl of Northumberland is made to say in 1' Henry IV (Act I, Scene III): "*North.* . . . Either envy therefore, or misprison is guilty of this fault, and not my son."

Speaking of the gift of his friend to himself, the Poet uses the word misprison, in the LXXXVII Sonnet:

"So thy great gift, upon misprison growing,
Comes home again, on better judgment making." (11, 12.)

Sec. 13. Sheriff's post.—

"*Mal.* . . . he says, he'll stand at your door like a sheriff's post, and be the supporter to a bench, but he'll speak with you."[1]

Sheriffs and such public officers have to give notice of the proclamations and sales, under the process of the court, of which they are officers, and this gave rise, in ancient times, to the custom of such officers erecting a post, at the front door of their houses, upon which they usually posted one of these proclamations or advertisement of sales, or other legal process delivered to them for service by publication.[2] As such ministerial officers supported the judgment seat, or "bench" by executing the decrees of the court, it is probable that this line means that the post, used by the sheriff for this purpose, carried out and helped to execute the decrees of the court and in this manner "supported" the "bench."

Sec. 14. Misdemeanor.—

"*Mal.* Sir Toby, I must be round with you. My lady bade me tell you, that, though she harbours you as her kinsman, she's nothing allied to your disorders. If you can separate yourself and your misdemeanors, you are welcome to the house; if not, and it would please you to take leave of her, she is very willing to bid you farewell."[3]

The term "misdemeanor" is generally used in contradistinction to felony, and it includes all the offenses known to the criminal law, inferior to the more important crimes, known as felonies.[4] All indictable offenses, not amounting to felonies, such as libels, assaults and batteries, nuisances, riots and such inferior offenses, are classed as mis-

---

[1] Twelfth Night, Act I, Scene V.

[2] Rolfe's Twelfth Night, p. 159, notes.

[3] Twelfth Night, Act II, Scene III.

[4] Sherwood's Criminal Law; 4 Bl. Com. 5.

demeanors, punishable by fine or imprisonment in jail, as distinguished from the more important crimes such as murder, arson, forgery, and the like crimes, punishable by death or a term in the penitentiary.[1]

Sec. 15. Grand-jury.—

"*Fab.* I will prove it legitimate, sir, upon the oaths of judgment and reason.
Sir To. And they have been grand-jurymen since before Noah was a sailor." [2]

As grand-jurymen sit upon the different offenses known to the law and indict or exonerate citizens for charges brought against them, the proper discharge of such duties, requires both reason and sound judgment. Hence the comparison made, that reason and judgment have been grand-jurymen since before Noah was a sailor. Of course the institution does not date to any such prehistoric times, but there is reason to believe that this institution existed among the Saxons[3] and it is certain that in the 12th century (by Statute 10' Hen. II)[4] if the institution did not exist before, it was established in England, since which time it has existed uninterruptedly.[5]

---

[1] Bishop's Cr. Law; 4 Bl. Com. 5.
[2] Twelfth Night, Act III, Scene II.
[3] Crabb, Eng. Law, 35.
[4] Enacted in 1164.
[5] 4 Bl. Comm. 302; 2 Russell, Crimes, 616.

In 1' Henry IV, Falstaff thus addresses the Travelers: "*Fal.* You are grand-jurors, are ye? We'll jure ye, i'faith." (Act II, Scene II.)

Timon of Athens, makes the leopard spots jurors on the life of the leopard, when the lion is near. He says to Apemantus: "*Tim.* Wert thou a leopard, thou wert german to the lion, and the spots of thy kindred were jurors on thy life; all thy safety were remotion." (Act IV, Scene III.)

Sec. 16. Windy side of the law.—

"*Sir To.* I will waylay thee going home; where, if it be thy chance to kill me,—
Fab. Good.
Sir To. Thou killest me like a rogue and a villain.
Fab. Still you keep o' the windy side of the law: good."[1]

The thought here expressed is, although the speaker should "lie in wait" and thus show premeditation, looking to the physical injury of Viola, still he would keep clear of the law, because, instead of making any threat to cause any bodily harm, his purpose was not so expressed in waiting for him. In other words, while there was a "lying in wait," there was a total absence of any premeditation to inflict bodily harm, hence the speaker kept next the wind, or on the windward side of the law, meaning that he thereby adopted precautionary measures for his security.[2]

---

[1] Twelfth Night, Act III, Scene IV.

For distinction between premeditation and simply lying in wait, see Dane, Abr, But lying in wait is usually evidence of premeditation.

[2] Webster, Dictionary. See Rolfe's Twelfth Night, p. 197, notes.

In Romeo and Juliet, the servants of Capulet, before provoking a quarrel with those of Montague, discuss'd how the law could be placed on their side and Sampson said: "Let us take the law on our sides; let them begin." (Act I, Scene I.)

And when Abram bit his thumb at them, Sampson asked: "Is the law on our side, if I say—ay?" (idem).

Peter tells the nurse and Romeo, in Romeo and Juliet: "I dare draw as soon as another man, if I see occasion in a good quarrel, and the law on my side." (Act II, Scene IV.)

In Gannon vs. Pauk, (200 Mo. p. 86) Judge Lamm, construes the "windy side" of the law, as the cold side, when he observes: "There is a 'windy,' that is, a cold side of the law, now as formerly (Twelfth Night, Act III, Scene IV.) and the law turns a cold face (a windy side) to perpetuities and the tying up of landed properties by entailment."

Sec. 17. Action of battery.—

"*Sir And.* Nay, let him alone, I'll go another way to work with him; I'll have an action of battery against him, if there be any law in Illyria; though I struck him first, yet its no matter for that."[1]

A battery is any unlawful beating or other wrongful physical violence inflicted upon a person, without his consent.[2] A battery is usually justifiable in the necessary defense of one's person against the assaults of his assailant, but the force used must be only such as is necessary to repel the attack made.[3] Force may be used only to avert an impending evil and to prevent a person from being overwhelmed, but not as a punishment or by way of retaliation for an injurious assault.[4] Any addition of specific ultimate wrong or means by which additional danger is inflicted generally is held to increase the offense of battery,[5] hence, the conclusion of the speaker, "though I struck him first, yet its no matter," since in strict legal aspect, the previous treatment would not have justified the punishment subsequently inflicted and an action for damages would lie therefor.

---

[1] Twelfth Night, Act IV, Scene I.
[2] 2 Bishop's Cr. Law, Sec. 62.
[3] 2 Bishop's Cr. Law, 561.
[4] *Ante. idem.* Strange, 593.
[5] 2 Bishop's Cr. Proc. Secs. 64, 65.

Enobarbus is made to say, in Antony and Cleopatra:
"*Eno.* . . . All take hands.—
Make battery to our ears with the loud music:—
The while, I'll place you." (Act II, Scene VI.)

Lysimachus, in Pericles, Prince of Tyre, speaking of the charms of Marina, asserts that by her sweet harmony she would allure and "make a battery through his deafen'd parts." (Act V, Scene I.)

Imogen threatens Iachimo, on his intemperate proposal to her, in Cymbeline, as follows:
"*Imo.* The king, my father, shall be made acquainted of thy assault." (Act I, Scene VII.)

Sec. 18. Party plaintiff.—

"*Oli* . . . Pry'thee be content;
This practice hath most shrewdly passed upon thee;
But, when we know the grounds and authors of it,
Thou shalt be both the plaintiff and the judge
Of thine own cause."[1]

Of course this would be an unheard of legal proceeding, wherein a party was also a judge in the cause, for it would lack the disinterested element which must always characterize the judge of any controversy.

A party plaintiff in a personal action is one who seeks a remedy for an injury to his rights.[2] After such person has been once named in the pleadings, it is proper to thereafter refer to him merely as the "plaintiff," as the reference is here made.[3]

In King John, in trying to dissuade the armies from battle, the Citizen thus addressed the officers present: "This union can do more than battery can, To our fast-closed gates, for at this match," etc. (Act II, Scene I.)

In Antony and Cleopatra, Antony tells Eros:

"Off, pluck off:—
The seven-fold shield of Ajax cannot keep
The battery from my heart." (Act IV, Scene XIV.)

Adonis is made to say to Venus, in Venus and Adonis: "Dismiss your vows; your feigned tears, your flattery; For where a heart is hard they make no battery." (425, 426.)

In A Lover's Complaint, the Poet describes the "fickle maid, full pale," who narrated the "sad-tun'd tale";

"Sometimes her level'd eyes their carriage ride,
As they did battery to the spheres intend." (22, 23.)

The maid, in A Lover's Complaint, described how her lover had woo'd her, as a supplicant, whose sighs extended, "To leave the battery" that her heart made against his. (276, 277.)

[1] Twelfth Night, Act V, Scene I.
[2] 3 Bl. Com. 25; 1 Chitty, Pl.
[3] 1 Chitty, Pl. (Gr. Ed.) 266.

CHAPTER V.

"MEASURE FOR MEASURE."

Sec. 19. Termes of the Law.
20. Dead Laws.
21. Custom shaping Laws.
22. Frailty of all laws—Especially jury system.
23. Action of Slander.
24. Prostitution before the Law.
25. Sentence.
26. Plea for Pardon.
27. Punishment for Seduction, by Venetian Law.
28. The severe Judge.
29. Common Law marriage contract.
30. Plea for Justice.
31. The Equality of Justice.
32. The Law a gazing-stock, when not enforced.
33. Confession of guilt.
34. Loyalty of Attorney.
35. Intent, distinguished from Wrongful Act.
36. Breach of Promise.
37. Punishment by marriage to Prostitute.

Sec. 19. Terms of the law.—

"*Duke.* . . . The nature of our people,
Our city's institutions, and the terms
For common justice, you're as pregnant in
As art and practice hath enriched any
That we remember."[1]

By "terms for common justice," the Poet no doubt refers to the technical language of the law, used by the courts of his time.

During the reign of Henry VIII, in 1527, "*Les Termes de la Ley,*" a scientific old law book, written by John Rastell in French, and translated by his son, William, appeared and this work contained an exposition of the "terms" of the law then most commonly in use.[2] It is

[1] Measure for Measure, Act I, Scene I.

[2] There seems to be some doubt as to whether the father, John, or the son William, wrote this work. Coke, Wood and others, attributed it to the son, while Bishop Tanner, Bale and others

possible that the Poet intended to refer to this old work, in these lines, spoken by the Duke. [1]

Sec. 20. Dead laws.—

"*Duke.* We have strict statutes and most biting laws,
(The needful bits and curbs for headstrong steeds)
Which for these fourteen years we have let sleep,
Even like an o'ergrown lion in a cave,
That goes not out to prey: now, as fond fathers,
Having bound up the threat'ning twigs of birch,
Only to stick it in their children's sight,
For terror, not to use; in time the rod,
Becomes more mocked than feared: so our decrees,
Dead to infliction, to themselves are dead;
And liberty plucks justice by the nose;
The baby beats the nurse, and quite athwart
Goes all decorum."[2]

This verse shows a deep insight into the science of laws and the well-known fact is recognized that a failure to enforce the laws that exist, brings about chaos in the State. The poet also seems possessed of the deeper insight, that laws are necessarily those legal principles and rules which are recognized by the governing power of the State, whether same are enforced in all cases or not; for the law is not the less a law, because the community sees fit not to enforce it, when it continues to be recognized by the governing body as a law of that community. And, as instanced in this play, even a departure from the enforcement of the strict letter of the law, by the governing body, itself, does not repeal the law, but it can be enforced, so long as it stands unrepealed. [3]

---

claimed it for the father. As originally published the title page of this work was as follows: "*Expositiones Terminorum Legum Anglorum, et Natura Brevium, cum diversis Casibus, Regulis, et Fundamentis Legum tam de Libris Magistri Littletoni quam de aliis Legum Libris collectis*," *etc.*, but the text was in French. IV Reeve's History Eng. Law, p. 565.

[1] Rolfe's Measure for Measure, p. 151, notes.
[2] Measure for Measure, Act I, Scene III.
[3] Montesquieu, Esprit des Lois, b. 1., c. 1.

Sec. 21. Custom shaping laws.—

"*Ang.* We must not make a scarecrow of the law
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror."[1]

Custom is such a usage, as by common consent and uniform practice has become the law of a place or of a given subject-matter.[2] That custom may not only change or alter law, but in the absence of law, that it may be crystallized into law, is a well recognized fact, which the English common law exemplifies. The common law, in fact, was made up of customs which had existed from time immemorial, or for such length of time that the "memory of man runneth not to the contrary."[3] General customs apply generally to a whole country and constitute general laws, while special customs apply only to special localities, or to special trades or vocations, such as the mining customs of the western states, which constitute some of our American common law.[4] A custom, however, cannot generally be recognized, if it is in the face of a well-established law, for not only must it be a reasonable custom, but one that is not illegal, to be given effect when invoked in court.[5]

---

[1] Measure for Measure, Act II, Scene I.
[2] Bouvier's Law Dict.
[3] 1 Bl. Comm. 76.
[4] White, Mines & Min. Rem., Sec. 69.
[5] *Ante idem.* Sec. 72.

Lord Sands said, in King Henry VIII: "*Sands.* New customs, though they be never so ridiculous, nay, let them be unmanly, yet are follow'd." (Act I, Scene III.)

Ruminating upon the custom which compels him to seek the support of the citizens for his preferment, Coriolanus said:
"*Cor.* Custom calls me to't;
What custom wills, in all things, should we do't,
The dust on antique time would lie unswept,
And mountainous error be too highly heap'd
For truth to over-peer." (Act II, Scene III.)

Sec. 22. Frailty of all laws—Especially jury system.—

"*Ang.* I not deny,
The jury passing on the prisoner's life,
May, in the sworn twelve, have a thief or two,
Guiltier than him they try: what's open made to justice,
That justice seizes. What know the laws,
That thieves do pass on thieves? 'Tis very pregnant,
The jewel that we find we stoop and take it,
Because we see it; but what we do not see,
We tread upon and never think of it."[1]

The substantive law is formed of customs, acts and adjudications as the rights to be passed upon arise. For years, many rights were overlooked, because of the universality of the law, to give relief in cases wherein equity now exercises jurisdiction. The remedial procedure, being dependent wholly on man, is necessarily more or less imperfect and this objection is frequently urged to the jury system, which this verse notices. But imperfect as it is, no institution has ever been found to improve upon it, in the trial of questions of fact. It dates from an early period in English history and was a mode of administering justice under the feudal institutions of France, Germany and other European countries.[2] It was perpetuated in England by Magna Charta and is guaranteed in all the states of the United States.[3]

The Chorus, in the character of Gower, in Pericles, Prince of Tyre, thus refers to custom: "By custom, what they did begin, Was, with long use, account no sin." (Act I, Pro.)

And Othello speaks of "the tyrant custom," which "hath made the flinty and steel couch of war, My thrice-driven bed of down." (Act I, Scene III.)

[1] Measure for Measure, Act II, Scene I.

[2] I Reeves, Hist. Eng. Law, 23, 84; Bracton, 155; Glanville, c. 9.

[3] 3 Bl. Comm. 349; Reeves, Hist. Eng. Law, *supra.*

Sec. 23. Action of slander.—

"*Elb.* Prove this, thou wicked Hannibal, or I'll have mine action of battery on thee.
Escal. If he took you a box o' the ear, you might have your action of slander too."[1]

This is satire, of course, or irony, for if an action of battery would lie for a slander, then, by a parity of reasoning, the conclusion is reached, that an action of slander would lie for a battery. As distinguished from a libel, which is written, slander is generally defined as spoken words, derogatory of the character of a person.[2] An action of slander will generally lie for any words spoken of another which impute to him the commission of a crime, involving moral turpitude,[3] so if the construction placed upon the words spoken here, had been the proper one, since an offense against the law was charged, an action of slander could have been maintained, not one of battery, as the Poet clearly shows.

---

[1] Measure for Measure, Act II, Scene I.
[2] Heard, Libel & Slan. Sec. 8.
[3] Heard, Libel & Slan. Sec. 24.

In King John (Act II, Scene I) the following occurs in the colloquy between Constance and Elinor: "*Eli.* Thou monstrous slanderer of heaven and earth.

Const. Thou monstrous injurer of heaven and earth, call not me slanderer."

In King Richard II (Act V, Scene VI) Bolingbroke thus replies to Exton, on learning of King Richard's death:

"*Boling.* Exton, I thank thee not; for thou hast wrought
A deed of slander with thy fatal hand,
Upon my head, and all this famous land."

In King Richard II, Mowbray replies to Bolingbroke (Act I. Scene I):

"*Nor.* O, let my sovereign turn away his face,
And bid his ears a little while be deaf,
Till I have told this slander of his blood,
How God and good men, hate so foul a liar."

Sec. 24. Prostitution before the law.—

"*Escal.* How would you live, Pompey? by being a bawd? What do you think of the trade, Pompey? is it a lawful trade?

Clo. If the law would allow it, sir.

Escal. But the law will not allow it, Pompey; nor it shall not be allowed in Vienna.

Clo. Does your worship mean to geld and spay all the youth in the city?

Escal. No, Pompey.

Clo. Truly, sir, in my poor opinion, they will to't then: if your worship will take order for the drabs and the knaves, you need not to fear the bawds.

Prince Henry is quoted as saying to the Hostess, in 1' Henry IV: "*P. Hen.* Thou sayest true, hostess; and he slanders thee most grossly." (Act III, Scene III.)

The wicked Margaret is made to say, in defense of Suffolk, when charged with Gloster's death, in 2' Henry VI: "*Q. Mar.* . . It may be judg'd, I made the duke away: So shall my name with slanders tongue be wounded, And princes courts be fill'd with my reproach." (Act III, Scene II.)

Suffolk thus replies to his accusers, in 2' Henry VI: "*Suff.* I wear no knife, to slaughter sleeping men; but here's a vengeful sword, rusted with ease, That shall be scoured in his rancourous heart, That slanders me with murder's crimson badge." (Act III, Scene II.)

And Warwick, suggests the proprieties of the situation to Queen Margaret in her defense of Suffolk, as follows: "*War.* Madam, be still; with reverence, may I say; For every word, you speak in his behalf, Is slander to your royal dignity." (2' Henry VI, Act III, Scene II.)

Excusing himself for his attempt to murder Margaret, Richard III, explains to Lady Anne: "*Glo.* I was provoked by her sland'rous tongue, That laid their guilt upon my guiltless shoulders." (Richard III, Act I, Scene II.)

The king refers to slander thus, in Hamlet: ". . haply, slander, whose whisper o'er the world's diameter, As level as the cannon to his blank, Transports his poison'd shot—may miss our name, and hit the woundless air." (Act IV, Scene I.)

And Othello tells Iago, after he has aroused his jealousy of his wife: "If thou dost slander her and torture me, Never pray more: abandon all remorse." (Act III, Scene III.)

Escal. There are pretty orders beginning, I can tell you: it is but heading and hanging.

Clo. If you head and hang all that offend that way but for ten years together, you'll be glad to give out a commission for more heads. If this law hold in Vienna ten years, I'll rent the fairest house in it, after three pence a day: If you live to see this come to pass, say Pompey told you so."[1]

Keeping a bawdy house was an offense both at common law and by statute. At common law, the offense was indictable as a common nuisance and it clearly involves moral turpitude.[2] The reasoning of the Clown, in defense of the practice, because of the prevalency of the offense, of course is not sound, for the same argument might be used to defend stealing or any other crime, if prevalent.

Sec. 25. Sentence.—

"*Prov.* Is it your will Claudio shall die tomorrow?

Ang. Did I not tell thee, yea? Had'st thou not order? Why dost thou ask again?

Prov. Lest I might be too rash:
Under your good correction, I have seen,
When, after execution, judgment hath
Repented o'er his doom."[3]

Execution, in criminal law, is putting a convict to death, agreeably to law, in pursuance of a sentence of the court.[4] After the sentence of the law is put in force, by an execution, of course it would be too late to correct any mistake, hence the suggestion to make any corrections before execution performed.

---

[1] Measure for Measure, Act II, Scene I.

[2] 5 M. & W. Exch. 249.

[3] Measure for Measure, Act II, Scene II.

[4] 4 Bl. Comm. 403; 3 Bl. Comm. 412.

In another play, the following sentence is pronounced: "*King.* Sir, I will pronounce your sentence; You shall fast a week with bran and water." (Love's Labour's Lost, Act I, Scene I.)

Sec. 26. Plea for pardon.—

"*Ang.* He's sentenced; 'tis too late.
Isab. Too late? why, no; I, that do speak a word,
May call it back again: Well believe this,
No ceremony that to great ones 'longs,
Not the king's crown, nor the deputed sword,
The marshal's truncheon, nor the judge's robe,
Become them with one-half so good a grace,
As mercy does. If he had been as you,
And you as he, you would have slipt like him;
But he, like you, would not have been so stern.
Ang. Your brother is a forfeit of the law,
And you but waste your words.

Speaking of Bolingbroke, King Richard II, said:
"*K. Rich.* O God: O God:
That e're this tongue of mine,
That laid the sentence of dread banishment
On yon proud man, should take it off again
With words of sooth." (Act III, Scene III.)

After his exile, Norfolk said to King Richard II:
"*Nor.* A heavy sentence, my most sovereign liege,
And all unlooked for from your highness mouth."
(Act I, Scene III.)

The Chief Justice explains to Henry V, how he had enforced the law, during his father's reign, and then concludes:
"*Ch. Jus.* . . . After this cold considerance, sentence me."
(2' Henry IV, Act V, Scene II.)

King Henry V said to Sir Thomas Grey, after discovery of his treason:
"*K. Hen.* God quit you, in his mercy. Hear your sentence."
(Act II, Scene II.)

Brabantio, on the loss of his daughter to the Moor, Othello, under the Duke's decision, said:
"He bears the sentence well that nothing bears,
But the free comfort which from thence he hears:
But he bears both the sentence and the sorrow,
That, to pay grief, must of poor patience borrow."
(Act I, Scene III.)

Tarquin lulls his conscience to rest with the philosophy that
"Who fears a sentence or an old man's saw,
Shall by a painted cloth be kept in awe."
(Rape of Lucrece, 244, 245.)

Isab. Alas, Alas:
Why, all the souls that were, were forfeit once:
And he that might the vantage best have took,
Found out the remedy: How would you be,
If he, which is the top of judgment, should
But judge you as you are? O, think on that;
And mercy then will breath within your lips,
Like man new made.

Ang. Be you content, fair maid:
It is the law, not I, condemns your brother:
Were he my kinsman, brother or my son,
It should be thus with him;—He must die to-morrow.

Isab. To-morrow? O, that's sudden; Spare him, spare him.
He's not prepared for death: Even for our kitchens,
We kill the fowl of season; shall we serve heaven
With less respect than we do minister
To our gross selves? Good, good, my lord, bethink you?
Who is it that hath died for this offense?
There's many have committed it.

Ang. The law hath not been dead, though it hath slept:
Those many had not dared to do that evil,
If the first man that did the edict infringe,
Had answered for his deed: now, 'tis awake.

. . . . . .

Isab. Yet show some pity.

Ang. I show it most of all, when I show justice;
For then I pity those I do not know,
Which a dismiss'd offense would after gall:
And do him right that, answering one foul wrong,
Lives not to act another. Be satisfied;
Your brother dies to-morrow: be content.

Isab. So you must be the first, that gives this sentence?
And he, that suffers: O, it is excellent
To have a giant's strength: but it is tyrannous
To use it like a giant.
Could great men thunder,
As Jove himself does, Jove would ne'er be quiet,
For every pelting, petty officer,
Would use his heaven for thunder; nothing but
thunder.—
Merciful heaven:
Thou rather, with thy sharp and sulphurous bolt,
Split'st the unwedgeable and gnarled oak,
Than the soft myrtle:—O, but man, proud man;
Drest in a little brief authority;

Most ignorant of what he 's most assured,
His glassy essence,—like an angry ape,
Plays such fantastic tricks before high heaven,
As make the angels weep: who, with our spleens,
Would all themselves laugh mortal.

. . . . . .

We cannot weigh our brother, with ourself:
Great men may jest with saints: 'tis wit in them;
But, in less, foul profanation.

Ang. Why do you put these sayings upon me?

Isab. Because authority, though it err like others,
Hath yet a kind of medicine in itself,
That skims the vice o' the top; Go to your bosom;
Knock there; and ask your heart, what it doth know
That's like my brother's fault: if it confess
A natural guiltiness, such as is his,
Let it not sound a thought upon your tongue
Against my brother's life."[1]

This colloquy denotes a very accurate knowledge of the underlying principle of the pardoning power and that it is essentially an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the particular individual receiving the pardon from the punishment the law prescribes for the crime committed.[2] As all pardons are necessarily in derogation of law, if the pardon is equitable, the law is bad, since good laws should be rigidly enforced and violations thereof ought not to be condoned or excused. But back of this, as human nature is frail, at best, the pardoning power is recognized, in order to prevent injustice, or to show mercy, in given cases, when to permit the law to be enforced would entail injustice.[3] That the Poet had a clear and accurate understanding of this reason for the lodgment of the power invoked by Isabella cannot be doubted, after a perusal of this play.

[1] Measure for Measure, Act II, Scene II.

[2] 7 Pet. 160.

[3] Bouvier's Law Dict.

Referring to the pardoning power, as an act of clemency, the Poet, in Comedy of Errors (Act I, Scene I) makes the Duke say:

Sec. 27. Punishment for seduction by Venetian law.—

"*Duke.* . . Your partner, as I hear, must die tomorrow,
And I am going with instruction to him.
Grace go with you. Benedicite.

"*Duke.* But, though thou art adjudged to the death,
And passed sentence may not be recalled,
But to our honour's great disparagement,
Yet will I favor thee in what I can."

In King Richard II, the Duchess of York, pleading for the life of her son, to Bolingbroke, is made to say:

"*Duch.* Nay, do not say,—stand up;
But, pardon, first; and afterwards, stand up.
And if I were thy nurse, thy tongue to teach,
Pardon—should be the first word of thy speech.
I never longed to hear a word till now;
Say—pardon, king; let pity teach thee how;
The word is short, but not so short, as sweet;
No word like pardon, for king's mouth's so meet."
(Act V, Scene III.)

After discovery of his treason, the Earl of Cambridge, said to King Henry V: "*Cam.* . . God be thanked for prevention; which I, in sufferance heartily will rejoice, beseeching God and you, to pardon me." (Act II, Scene II.)

In replying to Stanley's plea for pardon, for his servant, King Edward said, in King Richard III: "*K. Edw.* . . when your carters, or your waiting-vassals, Have done a drunken slaughter, and defac'd The precious image of our dear Redeemer, You straight are on your knees for pardon, pardon; And I, unjustly, too, must grant it." (Act II, Scene I.)

Replying to the good offices of the King, as conveyed by Capucius, on her death bed, Queen Katherine said, in King Henry VIII: "*Q. Kath.* O my good lord, that comfort comes too late; 'tis like a pardon after execution." (Act IV, Scene I.)

In his death struggle Antony said to Cleopatra: "*Ant.* . . I will o'ertake thee, Cleopatra, and weep for my pardon." (Act IV, Scene XII.)

Reflecting upon his own guilt the King observes, in Hamlet: "*King.* May one be pardon'd and retain the offence?" (Act III, Scene III.)

Juliet. Must die to-morrow: O injurious law,
That respites me a life whose very comfort
Is still a dying horror."[1]

It is written that the law in question, as presented in the old tale, from which this play is taken,[2] provided that the offender "should lose his head, and the woman offender should ever after be infamously noted."[3] It will thus be seen that this punishment affords but little consolation to the injured party, as the future life would be a "comfort," but still "a dying horror."

Sec. 28. The severe judge.—

"*Escal.* You have paid the heavens your function, and the prisoner the very debt of your calling. I have laboured for the poor gentleman, to the extremest shore of my modesty; but my brother justice have I found so severe, that he hath forced me to tell him, he is indeed—justice.

Duke. If his own life answers the straitness of his proceeding it shall become him well; wherein, if he chance to fail, he hath sentenced himself."[4]

"Justice" was a title given, in England, to the judges of the common-law courts,[5] and the same title is used in the United States, to indicate the presiding officers of such courts in the various State and Federal tribunals. It is a customary form to refer to an associate justice of such courts as "my brother justice."

"The straitness of his proceedings," refers to the details of the mode of carrying on the case against Claudio. "Proceeding" at common law, was the regular mode of carrying on a lawsuit.[6]

---

[1] Measure for Measure, Act II, Scene III.

[2] *Hecatommithi*, of Giraldi Cinthio, published in Venice, in 1566.

[3] Rolfe's Measure for Measure, p. 174, notes.

[4] Measure for Measure, Act III, Scene II.

[5] Anc. Laws and Inst. of Eng.; Coke, Litt. 71b; Leges Hen. I, Secs. 24, 63.

[6] Bouvier, Law Dict.

Sec. 29. Common law marriage contract.—

"*Duke.* Nor, gentle daughter, fear you not at all:
He is your husband, on a pre-contract:
To bring you thus together, 'tis no sin;
Sith that the justice of your title to him
Doth flourish the deceit. Come, let us go;
Our corn's to reap, for yet our tithe's to sow."[1]

This verse treats the party to a "pre-contract" of marriage, after cohabitation as the lawful wife of the other contracting party and this was strictly in accordance with the common law. At common law no form of contract, nor was any ceremony essential to constitute the relation, but mutual assent to the relation of husband and wife followed with cohabitation, in reliance thereon, was sufficient to make a man and woman husband and wife.[2] But it may be doubted if a cohabitation, procured by false personation of another, would be such consummation of the contract as to consummate the relation,[3] in the absence of a decree by such authority as backed up this intrigue or the use of such arbitrary force as made the recognition of the contract afterwards certain.

The use of the term, "pre-contract," as remarked by Mr. Davis,[4] "shows" that the distinction between marriage *per verba de presenti,* and that *per verba de futuro* "was plainly drawn in Shakespeare's mind."

The following occurs in 1' Henry IV, between Falstaff and Prince Henry: "*Fal.* Shall I? O rare: By the lord I'll be a brave judge. *P. Hen.* Thou judgest false already; I mean, thou shalt have the hanging of thieves and so become a rare hangman." (Act I, Scene II.)

Speaking of the Justice's duties, among those of man, whom heaven hath divided into various functions, the Archbishop of Canterbury, in Henry V, said: "*Cant.* The sad ey'd justice, with his surly hum, delivering o'er to executors pale, the lazy yawning drone." (Act I, Scene II.)

[1] Measure for Measure, Act IV, Scene I.

[2] 2 Roper, Husb. & Wife, 445, 475.

[3] 10 Clark & F. Hou. L. 534.

[4] Davis, Law in Shakespeare, 70.

Sec. 30. Plea for justice.—

"*Isab.* Justice, O, royal Duke; Vail your regard
Upon a wrong'd, I'd fain have said, a maid;
O worthy prince, dishonor not your eye
By throwing it on any other object,
Till you have heard me in my true complaint,
And give me justice, justice, justice, justice."[1]

Mr. Webster once said: "Justice, sir, is the great interest of man on earth."[2] To insure justice, is one of the main objects of all social compacts and to come nearer the standards by which it may be realized, is the pride of all civilizations. Institutions for the administration of justice have now reached the greatest perfection that the world has ever seen, and the broad, beneficent idea of "equal and exact justice, to all men, of whatever state or persuasion, religious or political," proclaimed by one of the greatest of the architects of our own free government, as a proper gauge for the rights of man, has become the guiding star by all liberty-loving people of the world. Justice is defined as the "Constant and perpetual will to render unto every man his due."[3] *Commutative justice* is the virtue of rendering unto every man that which belongs to him, as nearly as may be; to make an equality between the parties, to the end that no one may be the gainer by another's loss.[4] *Distributive Justice* consists in distributing rewards and punishments to each one, according to his merits, so that neither equal persons have unequal things, nor unequal persons things that are equal.[5] Justice is also said to be *exterior* and *interior,* the former being the object of jurisprudence and the latter the object of morality alone.[6] But in the broadest sense, it is a simple rule of right, with the object of giving every one

[1] Measure for Measure, Act V, Scene I.
[2] See, Judiciary, &c., Proc. 24th Meeting Mo. Bar Ass'n.
[3] Justinian, Inst., b. 1, tit. 1; Coke, 2 Inst. 56.
[4] Toullier, Droit, Civ. Fr. tit. prel. n. 5.
[5] *Ante, idem.*
[6] Droit, Civ. Fr. tit. prel. n. 6, 7.

his own. Isabella, here, sought her own and in so seeking sought but simple justice. Her plea therefor is certainly a touching appeal, calculated to move the hardest heart in favor of the virtue craved.

Sec. 31. The equality of justice.—

"*Duke.* The very mercy of the law cries out,
Most audible, even from his proper tongue,
An Angelo for Claudio, death for death,
Haste still pays haste, and leisure answers leisure;
Like doth quit like, and *Measure* still for *Measure.*
Then, Angelo, thy fault's thus manifested:
Which, though thou would'st deny, denies thee vantage."[1]

As *distributive justice* contemplates the distribution of rewards and punishments to each person, according to his

---

In Merchant of Venice (Act II, Scene VIII) the Jew is ridiculed, for seeking justice, as follows:

"*Salan.* I never heard a passion so confus'd,
So strange, outrageous and so variable,
As the dog Jew did utter in the streets:
My daughter:—O my ducats:—O my daughter:
Fled with a Christian?—O my Christian ducats:
Justice: the law: my ducats and my daughter:
A sealed bag, two sealed bags of ducats,
Of double ducats, stol'n from me by my daughter:
And jewels; two stones, two rich and precious stones,
Stol'n by my daughter:—Justice: find the girl."

Antipholus prays for justice from the Duke, in Comedy of Errors, as follows:

"*Ant.* Justice, most gracious Duke, oh, grant me justice:
Even for the service that long since I did thee,
When I bestrid thee in the wars, and took
Deep scars to save thy life; even for the blood
That then I lost for thee, now grant me justice."
(Act V, Scene I.)

Lady Capulet begs for justice, in asking for Romeo's death, in Romeo and Juliet, for the killing of Tybalt, as follows:

"*La. Cap.* I beg for justice, which thou, prince, must give:
Romeo slew Tybalt, Romeo must not live." (Act III, Scene.

[1] Measure for Measure, Act V, Scene I.

own deserts, so that persons similarly situated shall have substantially the same rewards or punishment, for the violated right, or the wrong inflicted,[1] it is apparent that this was understood by the Poet, and in denying Angelo any "vantage" from his position, for the offense he had committed, the Duke but meted out equal and exact justice to him, accordingly as he had dealt with Claudio.

Sec. 32. The law a gazing-stock, when not enforced.—

"*Duke.* My business in this state made me a looker-on,
here in Vienna,
Where I have seen corruption boil and bubble,
Till it o'errun the stew: laws, for all faults;
But faults so countenanced, that the strong statutes
Stand like the forfeit in a barber's shop,
As much in mock as mark.[2]

The thought here expressed is that the law becomes a mere gazing-stock, when not enforced. "Countenanced," is clearly used in the sense of approved, favored or encouraged; looked upon with favor or condoned. In other words, violations of the law had been so condoned that the law, itself, had become a mere mockery. It is a familiar form of legal or judicial expression, as to laws which have become a dead letter, by lack of enforcement.[3]

And again, in Love's Labour's Lost, Biron remarked: "And justice always whirls in equal measure." (Act IV, Scene III.)

In Winter's Tale, before the trial of the queen, Hermione, Leontes said: "Let us be cleared of being tyrannous, since we so openly proceed in justice; which shall have due course, even to the guilt, or the purgation." (Act III, Scene II.)

Warwick, in 3' Henry VI, is made to say: "*War.* . . Measure for measure, must be answered." (Act II, Scene VI.)

[1] Toullier, Droit, Civ. Fr. tit. prel. n. 5.

[2] Measure for Measure, Act V, Scene I.

[3] In a recent decision, by the Supreme Court of the State of Missouri, the Court said: "It ought not be expected that we would so hold as to encourage such a notion . . . and thereby make a *gazing-stock* of the law." 200 Mo., p. 400.

Sec. 33. Confession of guilt.—

"*Ang.* O, my dread lord,
I should be guiltier than my own guiltiness,
To think I can be undiscernible,
When I perceive your grace, like power divine,
Hath looked upon my passes: Then, good prince,
No longer session hold upon my shame,
But let my trial be my own confession;
Immediate sentence then, and 'sequent death,
Is all the grace I beg."[1]

As a voluntary confession of his guilt, this would be evidence[2] against Angelo, by which his conviction would follow, in a trial. But as the confession is but an *extra-judicial confession,* as distinguished from a *judicial confession,*[3] the Poet does not present it as more than evidence of his guilt, which might be offered, on a trial, but the plea is for an end of the session, at the trial, by a *judicial confession,* which would then necessarily put an end to the proceeding—when made without fear or hope of reward[4]—through the waiver of a trial; a plea of guilt and a subsequent immediate sentence.

And that other unnatural edicts would prove a similar gazing-stock, because of their non-enforcement, the Poet makes another player say, in Love's Labour's Lost:

"*Biron.* I'll lay my head to any good man's hat,
These oaths and laws will prove an idle scorn."
(Act I, Scene I.)

Clifford said, in 3' Henry VI: "*Cliff.* . . For what doth cherish weeds, but gentle air, And what makes robbers bold, but too much lenity?" (Act II, Scene VI.)

[1] Measure for Measure, Act V, Scene I.

[2] 1 Mood. Cr. Cas. 27, 452.

[3] 1 Lew. Cr. Cas. 46; 4 Carr. & P. 567; 2 Russell, Crimes (3d ed.), 876-878.

[4] If a confession is exacted by inducement, threats, promise or hope of reward, in general, it is not admissible against a prisoner. 1 Mood. Cr. Cas. 465; 4 Carr. & P. 570.

Sec. 34. Loyalty of attorney.—

"*Duke.* Come hither, Isabel:
Your friar is now your prince: As I was then
Advertising, and holy to your business,
Not changing heart with habit, I am still
Attorney'd at your service."[1]

The ethical side of an attorney's duty toward his client is here touched on, for to be "holy" to the client's "business"; "not changing heart with habit," but to be loyal to the person engaged, is but the primal duty of one "attorney'd" in another's service.

The business of attorneys is to carry on the practical and formal parts of suits.[2] The principal duties of attorneys are, to be true to the court and their clients; to manage the business of their clients with care, skill and integrity; to keep their clients informed as to the state of their business and to keep the secrets confided to them, as such.[3] That the Poet recognized these several duties as among the attorney's promised service, is apparent from this verse.

Confession is referred to in Love's Labour's Lost, as follows:

"*King.* Teach us, sweet madam, for our rude transgression
Some fair excuse.
Prin. The fairest is confession.
Were you not here, even now, disguised?"

(Act V, Scene II.)

In Macbeth, Malcolm is made to say: "My liege, they are not yet come back. But I have spoke with one that saw him die; who did report that very frankly he confess'd his treasons." (Macbeth, Act I, Scene I.)

After discovery of his treason, the earl of Cambridge, said to Henry V: "*Cam.* I do confess my fault; and do submit me to your highness mercy." (Act II, Scene II.)

Cardinal Beaufort, exclaims, concerning the murder of Gloster, in 2' Henry VI: "*Car.* . . O, torture me no more, I will confess." (Act III, Scene III.)

[1] Measure for Measure, Act V, Scene I.
[2] 1 Kent's Comm. 307.
[3] 4 Burr. 2061; 1 Barnew. & Ald. 202.

Sec. 35. Intent, distinguished from wrongful act.—

'Isab. My brother had but justice,
In that he did the thing for which he died:
For Angelo,
His act did not o'ertake his bad intent,
And must be buried but as an intent
That perished by the way: thoughts are no subjects,
Intents but merely thoughts."[1]

Here, the intent to commit an offense is clearly distinguished from the crime, or actual accomplishment of the act. Claudio "did the thing for which he died;" but with Angelo, "His act did not o'ertake his bad intent, and must be buried but as an intent, that perished by the way." In defining "intents" as "merely thoughts," the legal definition of a criminal intent it not far digressed from, as criminal intent is said to be "a design, resolve, or determination of the mind."[2] But, of course, from a strictly legal standpoint, the conclusion of the pleader is wrong, that because Angelo did not accomplish the crime intended, he was guilty of no offense, for as a matter of fact, when a man intending one wrong fails, and accidently commits another, he will, except when the particular intent is a substantive part of the crime, be held to have intended the act he did commit.[3] Nor is it any reply to this suggestion that Angelo was guilty of no offense, in thus meeting his own wife, for as he had refused to so recognize her, his act was equally as guilty as Claudio's, for the latter did recognize Juliet as his common law wife.

---

[1] Measure for Measure, Act V, Scene I.

[2] Bouvier, Law Dict.

[3] Roscoe, Crim. Evid. 272; Eden, Pen. Law (3d ed.), 229; 1 Carr. & K. 746.

In Henry V, Williams explains to the king: "*Will.* All offenses, my liege, come from the heart: never came any from mine, that might offend your majesty." (Act IV, Scene VIII.)

Speaking of the intent of Gloster, although not accomplished, Suffolk said, in 2' Henry VI:

Sec. 36. Breach of promise.—

"*Duke.* For this newly married man, approaching here,
Whose salt imagination yet hath wronged
Your well defended honor, you must pardon, for Mariana's sake;
But as he adjudged your brother (being criminal in double violation, of sacred chastity and of promise breach),
Thereon dependant for your brother's life."[1]

Claudio had been guilty of not only a breach of promise—which would have given, at common law, a civil action—but also of seduction, as well, under promise of marriage, as adjudged by Angelo. The "violation of sacred chastity" is nothing more nor less than the common law offense of seduction, which was defined as "the act of a man in inducing a woman to commit unlawful

---

"*Suff.* And, were't not madness, then,
To make the fox surveyor of the fold?
Who being accus'd a crafty murderer,
His guilt should be but idly posted over,
Because his purpose is not executed."
(Act III, Scene I.)

Illustrating the criminal intent of the deliberate murderer, the Poet makes Richard III say, while contemplating the murder of his brother: "*Glo.* . . if I fail not, in my deep intent, Clarence hath not another day to live." (King Richard III, Act I, Scene I.)

The Poet asks the Painter, to tell Timon of Athens: "*Poet.* I must say him so too; tell him of an intent that's coming toward him." (Act V, Scene I.)

The King is made to say, in Hamlet, reflecting on his guilt, in the murder of his brother: "*King.* . . My stronger guilt defeats my strong intent; And, like a man to double business bound, I stand in pause where I shall first begin, And both neglect." (Act III, Scene III.)

Tarquin is made to say, in The Rape of Lucrece:
"If Collatinus dream of my intent,
Will he not wake and in a desperate rage
Post hither, this vile purpose to prevent?" (218, 220.)

[1] Measure for Measure, Act V, Scene I.

sexual intercourse with him."[1] An action for breach of promise is a suit for damages for the violation of a "contract mutually entered into by a man and woman that they will marry each other."[2] While a breach of promise suit is always a civil suit for damages for violation of the contract of marriage, when such breach is accompanied by a seduction, the violator of the promise is subject to a criminal prosecution, in most countries, as for a violation of the criminal laws.[3]

Sec. 37. Punishment by marriage to prostitute.—

"*Duke.* . . . Proclaim it, provost, round about the city,
If any woman's wrong'd by this lewd fellow—
As I have heard him swear himself there's one
Whom he begot with child—let her appear,
And he shall marry her; the nuptial finish'd,
Let him be whipped and hang'd.

Lucio. I beseech your highness do not marry me to a whore. Your highness said, even now, I made you a duke; good my lord, do not recompense me in making me a cuckold.

Duke. Upon mine honor, thou shalt marry her.
Thy slanders I forgive and therewithal
Remit thy other forfeits.—Take him to prison
And see our pleasure herein executed.

Lucio. Marrying a punk, my lord, is pressing to death, whipping and hanging."[4]

This is no doubt a reference to the old Italian law, in force during the lifetime of the Poet, by which the punishment assessed against a criminal of the nature of Lucio, by the compulsory marriage to a prostitute, would be assessed in lieu of other penalty for his crime.[5] But the

[1] Bouvier, Law Dict.

[2] Strange, 937; Addison, Con. (4th ed.), 676.

[3] This is made a crime by statutes in most of the United States, as it was in England. 1 Bishop, Cr. Proc. 1106.

[4] Measure for Measure, Act V, Scene I.

[5] Fabio. Gori's *Archivio Storico*, etc., (Spoleto Tip. Bassani), vol. III, pp. 220, 221; Rolfe's Measure for Measure, p. 219, notes.

Duke, in this instance does not assess this punishment, in lieu of the other penalty the law authorized, but after the marriage of Lucio, to the woman he had wronged, he also contemplated that this offender should be whipped and hanged. Lucio's reply to this judgment of the Duke, that this combined the punishment assessed against those criminals who refused to plead, by pressing them to death, known as *peine forte et dure,*[1] elsewhere discussed,[2] with the other punishments assessed, shows how much he abhorred the sentence of marrying a prostitute.

---

[1] Fleta, lib. 1. c. 34, sec. 33; Brit. C. C. 4, 22.

[2] See King Richard II; Much Ado About Nothing.

CHAPTER VI.

"MUCH ADO ABOUT NOTHING."

Sec. 38. Endowment.
39. Breach of the Peace.
40. Punishment by pressing to death.
41. "Statutes of the Streets."
42. Qualifications of Constable.
43. Duties of the Nightwatch.
44. False Imprisonment.
45. Preliminary hearing.
46. Examination before Magistrate.
47. Householder.
48. Preliminary Examination for Burglary.
49. Trial by Manly Combat.
50. Count—Extra-Judicial Confession on.
51. False Testimony.
52. The Scales of Justice.

Sec. 38. Endowment.—

"*Bene.* I would not marry her, though she were endowed with all that Adam had left him before he transgressed."[1]

A person is said to be "endowed," when he or she has been provided for by a fixed or permanent support out of property or a certain fund or revenue.[2] The term applies peculiarly to a settlement made for a wife, by which she is endowed with some pecuniary provision for her support.[3] A dowry is a gift, or present for a bride, on espousal,[4] and is sometimes confounded with dower, which is the gift of the husband's property that the law makes to a widow on his death for the support of the widow and her children.[5] Benedict's statement is of course very extravagant that he would not marry Beatrice, if she possessed the whole world.

[1] Much Ado About Nothing, Act II, Scene I.
[2] Bouvier's Law Dict.
[3] 4 Kent's Comm. 65.
[4] Coke, Litt, 31.
[5] 2 Bl. Comm. 130; 4 Kent's Comm. 35.

Sec. 39. Breach of the peace.—

"*Leon.* If he do fear God, he must necessarily keep peace; if he break the peace, he ought to enter into a quarrel with fear and trembling."[1]

A breach of the peace is a violation of public order, commonly known as the offense of disturbing the peace.[2] The remedy for such an offense is by indictment and the offender may be held to bail, for his good behavior.[3]

In All's Well That Ends Well (Act IV, Scene IV) Helena is made to say: "*Hel.* Doubt not, but Heaven hath brought me up to be your daughter's dower as it hath fated her to be my motive and helper to a husband." And in the same play, it is said: "*King.* If thou be'st yet a fresh uncropped flower, Choose thou thy husband and I'll pay thy dower." (Act V, Scene III.)

The Chorus, in Henry V, advises that "the king doth offer him Katharine his daughter; and with her, to dowry, some petty and unprofitable dukedoms." (Act III, Scene I.)

In the agreement between Henry VI of England and Charles, King of France, for the marriage of the former with Margaret, it was provided that she should be "sent over of the king of England's own proper cost and charges without having dowry." (Act I, Scene I.)

And of this contract, York said: "I never read but England's kings have had large sums of gold, and dowries with their wives." (2' Henry VI, Act I, Scene I.)

Lady Grey thus replies to King Edward's suit, in 3' Henry VI: "*L. Grey.* Why, then, mine honesty shall be my dower; For by that loss I will not purchase them." (Act III, Scene II.)

King Richard III offers his hand to Queen Elizabeth for her daughter, his niece, as follows: "*K. Rich.* Even all I have; ay, and myself and all, Will I withal endow a child of thine." (Act IV, Scene IV.)

Timon asks the Old Athenian, as to his daughter for Lucillius, if he bring her proper dowry, in Timon of Athens: "*Tim.* How shall she be endow'd if she be mated with equal husband?" (Act I, Scene I.)

[1] Much Ado About Nothing, Act II, Scene III.

[2] Bishop, Stat. Crimes, index.

[3] This was called surety of the peace. 1 Bishop's Cr. Proc. 264.

As breaches of the peace commonly occur by blasphemy, it follows that one who fears God, "must necessarily keep peace." And the fact mentioned that one who "breaks the peace," "ought to enter into a quarrel with fear and trembling," applies, no doubt, to the legal attitude such a person would occupy, for in law, one who is not in the peace himself cannot have his peace disturbed.[1]

The Lord Chief Justice commands the peace, in 2' Henry IV (Act II, Scene I), as follows: "*Ch. Jus.* What's the matter? keep the peace here, ho!"

In his soliloquy before the battle of Agincourt, King Henry V said: "*K. Hen.* . . . in gross brains, little wots, what watch the king keeps, to maintain the peace, whose hours the peasant best advantage." (Act IV, Scene I.)

The Mayor of London commanded the peace, by open proclamation, in 1' Henry VI, as follows: "*May.* Nought rests for me, in this tumultuous strife. But to make open proclamation:—Come, officer, as loud as e'er thou canst. *Off.* All manner of men, assembled here in arms this day, against God's peace and the King's, we charge and command you, in his highness' name, to repair to your several dwelling-places; and not to wear, handle, or use any sword, weapon, or dagger, henceforward, upon pain of death." (Act I, Scene III.)

The Mayor of London, commanded the peace in the disturbance between the duke of Gloster and Winchester, in 1' Henry VI, as follows: "*May.* Fie, lords: that you, being supreme magistrates, Thus contumeliously should break the peace." (Act I, Scene III.)

King Henry VI thus commanded the peace: "*K. Hen.* We charge you, on your allegiance to ourself, to hold your slaughter'ng hands and keep the peace." (Act III, Scene I.)

Queen Margaret curses Richard, in King Richard III: "*Q. Mar.* . . . Oh, let them keep it, till thy sins be ripe, And then hurl down their indignation on thee, The troubler of the poor world's peace." (Act I, Scene III.)

After the battle of Bosworth, Richmond thus addresses his troops, in reference to the death of the tyrant Richard III:

[1] Bishop's Cr. Proc. 183.

Sec. 40. Punishment by pressing to death.—

"*Hero* . . . If I should speak,
She would mock me into air; O, she would laugh me
Out of myself, press me to death with wit."[1]

This is no doubt a reference to the ancient punishment of pressing a criminal charged with felony to death, for his malicious refusal to enter a lawful plea, on being arraigned.[2] The Poet uses this punishment in different plays.[3] This was known to the old common law as punishment of *peine forte et dure,* and if the defendant

---

"*Richm.* Let them not live to taste this land's increase,
That would, with treason, wound this fair land's peace;
Now civil wounds are stop'd, peace lives again;
That she may long live here, God say—Amen."
(Act V, Scene IV.)

Speaking to his peers, at his trial, Cranmer said, in King Henry VIII: "*Cran.* . . nor is there living (I speak it with a single heart, my lords), A man that more detests, more stirs against, Both in his private conscience and his place, Defacers of a public peace, than I do." (Act V, Scene II.)

Benvolio said to Tybalt, in Romeo and Juliet, on parting the servants of Capulet and Montague:

"I do but keep the peace; put up thy sword,
Or manage it to part these men with me."
(Act I, Scene I.)

Capulet tells Paris: "And Montague is bound, as well as I in penalty alike; and 'tis not hard, I think, For men so old as we to keep the peace." (Act I, Scene II.)

Saturninus (in Titus Andronicus) speaks of the "disturbers of our peace," buzzing in the people's ears what had pass'd which was naught but lawful." (Act IV, Scene IV.)

In Titus Andronicus, (Act II, Scene I) Aaron commands the peace in the customary manner, to stop the quarrel between Chiron and Demetrius, as follows: "Clubs, clubs, these lovers will not keep the peace."

[1] Much Ado About Nothing, Act III, Scene I.

[2] Fleta, lib. 1, C. 34.

[3] Measure for Measure, Act V, Scene I; Richard II, Act III, Scene IV.

persisted in his refusal to plead and it was found to be because of his own malice and stubbornness, instead of due to his own physical disability, he was placed upon a board and pressed with heavy weights, until the life was pressed out of him.[1]

Sec. 41. "Statutes of the Streets."—

"*Verges.* If you hear a child cry in the night, you must call to the nurse and bid her still it.
Watch. How if the nurse be asleep and will not hear us?
Dogb. Why, then, depart in peace, and let the child wake her with crying; for the ewe that will not hear her lamb when it baes will never answer a calf when he bleats."[2]

It is quite probable that this part of this scene was intended as a burlesque upon The Statutes of the Street,[3] by one provision of which it was provided that "no man shall, after the houre of nyne at night, keep any rule, whereby any such suddaine outcry be made in the still of the night, as making any affray, or beating his wyfe, or servant, or singing or revyling in his house, to the disturbance of his neighbours, under paine," etc.[4]

This method of treating felons who stood mute, was introduced some time between the 5th Hen. III, or the time of Bracton, and the 3d Edw. I. They were to be bareheaded, barefooted and in their coat, only, ungirth, confined in prison, on the bare ground, day and night, with only bread made of barley and bran, and water, the day they did not eat, and they were to be fastened down with irons. II Reeve's History Eng. Law., p. 425.

For changes made in the form and manner of this punishment, in the reign of Henry IV, see III Reeve's History Eng. Law, p. 439.

[1] Fleta, *supra.*

[2] Much Ado About Nothing, Act III, Scene III.

[3] Statutes of the Street, by Wolfe, in 1595; Rolfe's Much Ado About Nothing, p. 190, notes.

[4] Sec. 30, *supra.*

Sec. 42. Qualifications of constable.—

"*Dogb.* First, who think you the most desartless man to be constable?

1 *Watch.* Hugh Outcake, sir, or George Seacoal; for they can write and read.

Dogb. Come hither neighbour Seacoal. God hath blessed you with a good name: to be a well favored man is the gift of fortune; but to write and read comes by nature.

2 *Watch.* Both which, master constable,—

Dogb. You have; I knew it would be your answer. Well, for your favor, sir, why, give God thanks, and make no boast of it; and for your writing and reading, let that appear when there is no need of such vanity. You are thought here to be the most senseless and fit man for the constable of the watch; therefore, bear you the lantern: this is your charge; you shall comprehend all vagrom men: you are to bid any man stand, in the prince's name."[1]

The Poet's deep seated dislike for constables and justices of the peace is here manifested. That the "constable of the watch" was "senseless," hence the "fit man" for the place is, of course, satire. The duties of a constable were to "keep the peace," in his district.[2] To "bear the lantern," was a ridiculous duty assigned the constable to further add to the disgrace of his office. The duty to "comprehend all vagrom men," was intended to apply to the constable's duty to apprehend vagrants, or those living idly and refusing to work.[3] The right "to bid any man stand, in the prince's name," embraced the common law right and duty of any peace officer to arrest or detain any person committing a breach of the peace in his presence.[4]

---

[1] Much Ado About Nothing, Act III, Scene III.

[2] 1 Bl. Comm. 356; Jacob, Law Dict.; Coke, 4 Inst., 267.

[3] 5 East. 339.

[4] 4 Bl. Comm. 292; 1 Carr. & P. 40.

Upon the testimony of Olds, corroborative of the report that when 22, Shakespeare, was apprehended for "poaching" on the

Sec. 43. Duties of the nightwatch.—

"*Dogb.* If you meet a thief, you may suspect him, by virtue of your office, to be no true man; and, for such kind of men, the less you meddle or make with them, why, the more is for your honesty.

2 *Watch.* If we know him to be a thief, shall we not lay hands on him?

Dogb. Truly, by your office, you may; but I think, they that touch pitch will be defiled: the most peaceable way for you, if you do take a thief, is, to let him show himself what he is, and steal out of your company. . . .

Verg. If you hear a child cry in the night, you must call to the nurse and bid her still it.

2 *Watch.* How if the nurse be asleep, and will not hear us?

Dogb. Why, then, depart in peace, and let the child wake her with crying; for the ewe that will not hear her lamb, when it baes, will never answer a calf, when he bleats."[1]

The same satire, which characterizes the Poet's feeling toward constables, justices and such like petty officers, manifests itself in this colloquy. That the thief should be let go, and even the crying child abandoned, if the

---

premises of Sir Thos. Lucy and next morning was arraigned before Sir Thomas, who was a justice of the peace, of Charlecote, the bitter satire and ridicule which the Poet always heaps upon constables and justices, when they are introduced into his plays, would seem to furnish additional evidence of the truth of this report.

In Love's Labour's Lost, the Constable is named "Dull" and he is made to say: "*Dull.* I'll make one in a dance, or so; or I will play on the tabor to the worthies, and let them dance the hay." And to this the schoolmaster replies: "*Hol.* Most dull, honest Dull, to our sport away." (Act V, Scene I.)

In All's Well That Ends Well (Act II, Scene II) the constable is presented as about the lowest of officials, in the following verse: "*Clo.* From below your duke, to beneath your constable, it will fit any question."

[1] Much Ado About Nothing, Act III, Scene III.

nurse could not be found, is, indeed, an extreme criticism of such officers' duties, and the ignorance of such officer is presented by the fact that it was not known that a lamb bleats, while a calf baes.

Back of this humor, however, is the legal proposition, embodied by the question of the Watch, as to his right to arrest without a warrant and the reply, that by virtue of his office, he had such right. This is strictly according to law, for any peace officer, such as a constable or watchman, may arrest without a warrant, when a crime is committed in his presence, or when he has reasonable grounds to believe a felony has been committed and that the party arrested is the felon.[1]

Sec. 44. False imprisonment.—

"*Dogb.* This is the end of the charge. You, constable, are to present the prince's own person; if you meet the prince in the night, you may stay him.
Verg. Nay, by'r lady, that I think, he cannot.
Dogb. Five shillings to one on't, with any man that knows the statutes, he may stay him; marry, not without the prince be willing: for, indeed, the watch ought to offend no man; and it is an offense to stay a man against his will."[2]

This graceful backing down from a wrong position on the law, as such petty officers are accustomed to do, by drawing a nice distinction, such as is done in this case, is well presented here.

The charge that the constable represents the prince's own person, means as a conservator of the peace. The charge that he possesses the authority to detain the prince himself, when questioned, leads to the adroit retraction, by the use of the distinction that he may be restrained, if he so desires. Then following this qualification of the former position, is the proper legal idea of a false im-

[1] 3 Taunt. 14; 3 Campb. 420; 4 Bl. Comm. 292; 1 Saund. 77.
[2] Much Ado About Nothing, Act III, Scene III.

prisonment or arrest, arising from a wrongful detention of any man, against his will. At common law, any unlawful restraint of a man's liberty, whether in a place used for imprisonment generally, or in a place so used on the particular occasion, with or without bolts and bars, constituted a false imprisonment.[1] Of course the arrest of a criminal or one believed to have committed a known offense, was not within this rule, for, in such case the detention was not held to be wrongful. But that the elements of a false arrest were duly understood by the Poet, is evidenced by the last line of this verse.

Sec. 45. Preliminary hearing.—

"*Dogb.* Go, good partner, go; get you to Francis Seacoal; bid him bring his pen and inkhorn to the goal; we are now to examination these men.

Verg. And we must do it wisely.

Dogb. We will spare for no wit, I warrant you; here's that (touching his forehead) shall drive some of them to a *non-com:* only get the learned writer to set down our excommunication, and meet me at the goal.[3]

As the evidence of the witnesses was all written down at the preliminary hearings, before magistrates, when one was charged with an offense, to preserve the evidence for the benefit of the court and jury, which would try the accused for the offense, this is the proceeding here referred to, in requesting the "pen and inkhorn," as a preliminary to the examination.

The expression that some of the offenders shall be driven, by the play of his wit, *"to a non-com,"* evidently means that he will push them to the extreme of madness. In legal parlance, a *non-compos mentis* is one not of sound

[1] 2 Bishop, Cr. Law, 669; 4 Bl. Comm. 218.
[2] 3 Hawkins, Pl. Cr. 164; 4 Bl. Comm. 292.
[3] Much Ado About Nothing, Act III, Scene V.
[4] 2 Leach Cr. Cas. 552; 4 Bl. Comm. 296.

mind or memory and the terms signify all species of madness, whether arising from idiocy, sickness, or otherwise.[1] The abbreviation of these legal terms, by the constable, is no doubt used, to show his extreme ignorance and arrogance, like the suffix to the word "examine," in the third line; the egotistical assurance of the constable, and the use of the prefix and wrong use of the word in the last line of the verse quoted.

Sec. 46. Examination before magistrate.—

"*Dogb.* Is our whole dissembly appeared?
Verg. O, a stool and a cushion, for the sexton.
Sexton. Which be the malefactors?
Dogb. Marry, that am I and my partner.
Verg. Nay, that's certain; we have the exhibition to examine.
Sexton. But which are the offenders that are to be examined? Let them come before master constable."[2]

The ignorance of the constable is again portrayed, with seeming pleasure by the Poet, in this presentation of an examination before the magistrate. Such examinations were usually accomplished by bringing the witnesses and the accused before a justice of the peace or peace officer, and writing down the evidence of the witnesses. If no cause for his detention should be shown, the prisoner was discharged, but if a crime was uncovered, or sufficient suspicion attached to the charge, to warrant putting him upon his trial, the evidence of the witnesses was certified by the magistrate to the court where he was to be tried, with the recognizance of the witnesses and the prisoner was committed to jail or placed under bond to answer to the charges filed against him.[3] The word malefactor, meaning a wrongdoer, is one who has committed some

[1] Coke, Litt. 247; 4 Coke, 124; Shelford, Lun. 1.
[2] Much Ado About Nothing, Act IV, Scene II.
[3] 2 Carr & K. 223; 4 Bl. Comm. 296; 2 Leach, Cr. Cas. 552.

crime,[1] but as the term is usually only applied to a person, after conviction for some offense, it is irregular to so term one who is merely accused; but as it seemed a part of the Poet's plan to show how soon the conviction or holding of the accused would follow, in such a court, after the filing of the charge, the term is perhaps used with this intent, in this instance.

Sec. 47. Householder.—

"*Dogb.* Dost thou not suspect my place? Dost thou not suspect my years?—O that he were here to write me down—an ass:—but, masters, remember that I am an ass; though it be not written down, yet forget not that I am an ass:—No, thou villain, thou art full of piety, as shall be proved upon thee by good witness. I am a wise fellow; and, which is more, an officer; and, which is more, a householder: and, which is more, as pretty a piece of flesh as any is in Messina; and one that knows the law, go to; and a rich fellow, enough, go to; and a fellow that hath had losses; and one that hath two gowns, and everything handsome about him:—Bring him away. O, that I had been writ down,—an ass."[2]

This portrayal of the ignorance of the constable, is another evidence of the Poet's dislike for this class of officers. The misnomer that the prisoner was full of "piety" instead of guilt, and that they did not "suspect' his place or years, as well as the bragging and egotistical bearing of the speaker, show the ignorant bravado that too often characterizes such petty officers.

The claim to being a "householder," illustrates the basis of certain rights of citizenship which attach to a "householder," or one who has and provides for a household,[3] as distinguished from one who is not so possessed.

The Archbishop of Canterbury, speaking of magistrates, in Henry V, said: "*Cant.* . . some, like magistrates, correct at home." (Act I, Scene II.)

[1] Bouvier, Law Dict.

[2] Much Ado About Nothing, Act IV, Scene II.

[3] Bouvier, Law Dict.

Sec. 48. Preliminary examination for burglary.—

"*Dogb.* Yea, marry, that's the eftest way:—Let the watch come forth:—Masters, I charge you, in the prince's name, accuse these men.

1 *Watch.* This man said, sir, that Don John, the prince's brother, was a villain.

Dogb. Write down—prince John a villain—why, this is flat perjury, to call a prince's brother—villain.

Bora. Master constable,—

Dogb. Pray thee, fellow, peace; I do not like thy look, I promise thee.

Sexton. What heard you say him else?

2 *Watch.* Marry, that he had received a thousand ducats of Don John for accusing the lady Hero wrongfully.

Dogb. Flat burglary, as ever was committed.

Verg. Yea, by the mass, that it is."[1]

This portrayal of the ignorance and misuse of the legal terms, by the constable, while illustrating a common trait of such petty officers, seems to be repeated with a method.

The crime of "perjury," of course, was not committed by the calling of Don John a villain, but if any offense this would be slander only, as it would be slander, instead of "burglary," to wrongfully accuse Hero.

The examination of the witnesses here followed was that prescribed by the common law by a magistrate, to ascertain if a bailable offense had been committed.[2] At common law the accused could not be examined, but only the witnesses against him.[3] Hence, the injunction to the accused, to keep his peace.

Sec. 49. Trial by manly combat.—

"*Leonato.* . . . Thou hast so wrong'd mine innocent child and me
That I am forc'd to lay my reverence by,
And, with grey hairs and bruise of many days,
Do challenge thee to trial of a man.[4]

---

[1] Much Ado About Nothing, Act IV, Scene II.

[2] 4 Bl. Comm. 296; 2 Leach, Cr. Cas. 552.

[3] Roscoe, Cr. Evid. 44; Phillipps, Evid. 106.

[4] Much Ado About Nothing, Act V, Scene I.

This was the custom of the common law, when a litigant asserted his writ of right, and chose to defend his right by duel.[1] Shakespeare was evidently familiar with this barbarous practice, for he refers to the trial by duel, or battle, in different plays.[2] The demandant met the defendant in an open test of strength and they fought until one or the other was killed or vanquished, and the victor was held to have won his suit. If the demandant died a natural death before the battle, or duel, was fought, he had a right to be represented by his son, born in lawful wedlock, but if his death was by any fault or neglect of his, this was held to be an end of the contest, in favor of his opponent.[3]

Sec. 50. Count—Extra-judicial confession on.—

"*Bora.* Sweet prince, let me go no further to mine answer; do you hear me, and let this count kill me. I have deceived even your very eyes: what your wisdoms could not discover, these shallow fools have brought to light; who, in the night, overheard me confessing to this man, how Don John, your brother, incensed me to slander the lady Hero; how you were brought into the orchard, and saw me court Margaret, in Hero's garments; how you disgraced her, when you should marry her: my villany they have upon record; which I had rather seal with my death, than repeat over, to my shame: the lady is dead upon mine and my master's false accusation; and, briefly, I desire nothing but the reward of a villain."[4]

The confession of record, or the examination of the witnesses, by which the evidence of the offense was transcribed, is referred to, by the speaker, by the statement of the fact that "my villainy they have upon record." This was a repetition of the extra-judicial confession that the

[1] 1 Reeve's History Eng. Law, p. 393.
[2] Richard II, Act I, Scene I; Act IV, Scene I.
[3] 1 Reeve's History Eng. Law, *supra.*
[4] Much Ado About Nothing, Act V, Scene I.

watchman heard him in the night "confessing to this man." The willingness expressed, to "let this count kill me," refers to the different charges or paragraphs in a declaration or indictment, by which the pleader set up the offenses or the causes of action.[1] Each *count* usually refers to a different offense or cause of action.[2]

Sec. 51. False testimony.—

"*D. Pedro.* Officers, what offense have these men done?
Dogb. Marry, sir, they have committed false report; moreover, they have spoken untruths; secondarily, they are slanders; sixth and lastly, they have belied a lady; thirdly, they have verified unjust things: and, to conclude, they are lying knaves."[3]

The officer here—through the Poet's satire—attempts to make of the offense of slander and of bearing false testimony, many separate distinct offenses, which are, in reality, the same, as the Poet clearly knows. To circulate false reports; to speak untruths and to have "belied a lady," are all different ways of charging a slander, but to "verify unjust things," while a mere slander, if made out of court, too, would be bearing false testimony, if made in court, hence would be a criminal offense, for if a witness swears to what he knows to be untrue, this is a crime.[4]

Sec. 52. The scales of justice.—

"*Dogb.* Come, you, sir; if justice cannot tame you, she shall ne'er weigh more reasons in her balance; nay, an you be a cursing hypocrit once, you must be looked to."[5]

This personification of justice, from the mythological idea of a blind-fold Goddess, dispensing justice, through

---

[1] Gould, Pl. c. 4; Stephen, Pl. 279.
[2] *Ante idem.*
[3] Much Ado About Nothing, Act V, Scene I.
[4] Roscoe, Cr. Evid. 362.
[5] Much Ado About Nothing, Act V, Scene I.

the medium of evenly balanced scales, upon which the rights of litigants were weighed, is the current way of typifying justice, because of the prevalency of the myth, which so represented this virtue. As the reasons for and against a criminal, in the investigation of a charge, would be the consideration entering into the conclusion of his guilt or innocence, the expression, "she shall ne'er weigh more reasons in her balance," is tantamount to saying that the Goddess herself would be so convinced of the offender's guilt, in this instance, that if he was not punished, the scales of justice would be wholly discarded.

Referring to the enforcement of the law against him, when he was Prince of Wales, King Henry V, said to the Lord Chief Justice, in 2' Henry IV:

"*King.* You are right, justice, and you weigh this well;
Therefore still bear the balance and the sword."
(Act V, Scene II.)

The Goddess of Justice, like the God of Love, was painted blind that she might not look with the eye, but with the mind, or, as the Poet expresses it, in the latter instance,

"Love looks not with the eyes, but with the mind,
And therefore is winged Cupid painted blind."
(Midsummer Night's Dream, Act I, Scene I.)

2' King Henry VI said, in speaking of the offenses committed by Duchess of Gloster:

"*K. Hen.* . . And poise the cause in justice's equal scales,
Whose beam stands sure, whose rightful cause prevails."
(Act II, Scene I.)

Before murdering Desdemona, Othello observes of her breath: "O balmy breath, that dost almost persuade Justice to break her sword." (Act V, Scene II.)

CHAPTER VII.

"MIDSUMMER NIGHT'S DREAM."

Sec. 53. Jurisdiction of Athenian Laws.
54. Parent and Child, under Greek Law.
55. Parent's right of Infanticide, by Athenian Law.
56. Pleading for Fee.
57. Parent's Consent to Child's Marriage.
58. Limitation of Municipal Law.

Sec. 53. Jurisdiction of Athenian laws.—

"*Lys.* A good persuasion; therefore, hear me Hermia.
I have a widow aunt, a dowager
Of great revenue, and she hath no child;
From Athens is her house remote seven leagues,
And she respects me as her only son.
There, gentle Hermia, may I marry thee;
And to that place the sharp Athenian law cannot pursue us."[1]

This reference to the "widow aunt," it is believed, is not so much to show a guardian, who could consent to the marriage, as to state the fact that her home would furnish a haven, beyond the jurisdiction of the law of Athens. If the residence of the widow aunt, was, as stated, a distance equivalent to seven English leagues, it would be about twenty-one miles from Athens and this distance would no doubt have carried Lysander and Hermia into another district, where different laws obtained. For it must be remembered that the free states of Greece were merely cities with their districts, and each district possessed its own constitution and had exclusive management of its own concerns.[2] The different states of Attica, for instance, had their respective heads, or presidents, and the different peoples or tribes adopted their own laws and regulations in so far as they did not con-

[1] Midsummer Night's Dream, Act I, Scene I.

[2] 3 St. John's Manners & Customs of Ancient Greece, 76, 77; Schoman's Dissertation on the Assemblies of the Athenians, 346, 356, 358.

flict with the general laws of the State.[1] So if the distance to be traveled would carry the lovers into another district of the state, it was no doubt, true, as the Poet states, that the "sharp Athenian law" could not pursue them.

Sec. 54. Parent and child, under Greek law.—

"*Ege.* . . . And, my gracious duke,
Be it so she will not here, before your grace,
Consent to marry with Demetrius,
I beg the ancient privilege of Athens;
As she is mine, I may dispose of her;
Which shall be either to this gentleman,
Or to her death; according to our law,
Immediately provided in that case."[2]

Egeus here claimed the law, as it was known to exist, not only in ancient Greece, but in Egypt, Persia and Rome, as well.[3] According to the "ancient privilege of Athens," the child was regarded more as the property of the parent than as an independent rational being, and a father was allowed a very absolute dominion over the child.[4] The Twelve Tables,[5] of the Romans, were no doubt taken by the deputies from the laws of ancient Greece and the fourth of these tables gave the father not only the power of sale, but the power of life and death, as well, over his children.[6] After the expulsion of Tarquin,

[1] Hereen, on Political History of Ancient Greece (Oxford ed.), 1834.

[2] Midsummer Night's Dream, Act I, Scene I.

[3] St. John's Hist. Manners & Customs Anc. Greece, i, 120-125; 2 Kent's Comm. (12 ed.), 204 and note.

[4] Taylors, Elem. Civ. Law, 395, 402; Caesar, de Bel. Gal. lib. 6, c. 19; 2 Kent's Comm. (12 ed.), 204 and note.

[5] Livy, b. 6, c. 1; Heineccii Hist. Juris Civilis, lib. 1, sec. 26; Cicero, Orat. in Cat, 3, 4; Niebuhr, Roman Hist. ii, 235 (ed-Phil. 1835); 2 Hooke's Roman Hist., c. 27; Gravina, de Ortu et Prog. J. C. 32; 1 Arnold's Hist. of Rome, 284.

[6] Gravina, De Jura, Naturalia Gentium et XII Tabularum; 2 Kent's Comm. (12 ed.) 520, 521, and note.

Rome suffered from an absence of written laws and the Twelve Tables were prepared by a commission, after a visit to Athens to learn the laws and study the institutions of that country.[1] The laws prepared or transcribed by this commission were engraven on tablets of brass,[2] and they continued in effect until the time of the Emperor Hadrian.[3]

Sec. 55. Parent's right of infanticide by Athenian law.—

"*The.* . . . For you, fair Hermia, look you arm your self
To fit your fancies to your father's will;
Or else the law of Athens yield you up
(Which by no means we may extenuate)
To death, or to a vow of single life."[4]

Under Draco's laws, death in Athens was appointed for almost all offenses. Those convicted of idleness or the theft of a cabbage or an apple were made to suffer the same penalties as criminals who committed sacrilege or murder, according to Plutarch. (Plutarch's Life of Solon.)

From the most authentic sources it is established that the laws permitting the sale or murder of daughters, by fathers or brothers, stood in Athens, until such barbarous ordinances were repealed, along with the law which permitted the creditor to take the person of his debtor as his security for a debt owing to him, by the wise Solon.

"Solon forbade the sale of daughters or sisters into slavery by fathers or brothers, a prohibition which shows how much females had before been looked upon as articles of property." 3 Grote's Greece, 99, 135, 140; Plutarch's Life of Solon.

The names of Theseus and Demetrius, in this play, are no doubt selected by the Poet for Theseus, king of Attica, who first established the political power of Athens and made it the metropolis and Demetrius Phalereus or Demetrius Poliorcetes, who restored the constitution of Athens, after Antipater's oligarchy of wealth. Grote's Greece, vol. 12, p. 324.

[1] 1 Kent's Comm. (12 ed.), 520.
[2] Cicero, Orat. in Cat. 3, 4; 1 Kent's Comm. (12 ed.), 525.
[3] 2 Kent's Comm. (12 ed.), 204.
[4] Midsummer Night's Dream, Act I, Scene I.

Theseus here but proclaimed the law of Athens, as it existed at a period anterior to the time of Solon, for at this period in the world's history, the people generally carried the power of the parent over the person and liberty of the child to an atrocious extent and not only in Greece, but in Persia, Egypt, Gaul and Rome, infanticide was tolerated and the lives and liberty of the children were placed in the hands of the father.[1] In Rome the power of life and death over the child was not regarded as an absolute license of the parent, but was a species of domestic jurisdiction, recognized as a lawful right of the parent. This power, in Rome, was weakened a great deal in the time of Augustus, but it was perhaps not until Valentinian and Valens made the offense of killing infants a capital crime, that the practice was abolished in Rome.[2]

In Greece, at the time of the play, the Poet makes this horrible practice still within the power of a parent and no doubt this is correct, for prior to the time of Solon, under the ordinances of Draco, the right was recognized as within the lawful power of a parent,[3] which Theseus declines to "extenuate."

Sec. 56. Pleading for fee.—

"*Puck.* Captain of our fairy band,
Helena is here at hand,
And the youth, mistook by me,

---

[1] Taylor's Elements of Civil Law, 395, 402; 1 St. John's Hist. Manners & Customs of Ancient Greece, 120-125; Voyage du Anarcharis en Grece, iii, c. 26; Justinian's Inst. 1, 9; Caesar de Bel. Gal. lib. 6, c. 19; Sallust, Bel. Cat. c. 39; De Patria Potestate; Heinneccius, Syntagma Ant. Rome, etc., lib. 1, tit. 9, Opera iv; Rynkershoek's Opusculum, de jure, etc., Opera 1, 346; Noodt, de Partus Expositione et Nice apud Veteres. Infanticide was the horrible vice of all antiquity. III Gibbon's History, 55-57. The Roman authors termed this power of the father *patria majestas*. Heinneccius, Syntagma Antiq. Rome, Jur. lib. 1, tit. 9, Opera iv; 7 Am. Law Rev. 61.

[2] Taylor's Elements Civil Law, 403-406; 2 Kent's Comm. (12 ed.) 204.

[3] Plutarch's Life of Solon; 3 Grote's Greece, 99, 135.

Pleading for a lover's fee,
Shall we their fond pageant see?
Lord, what fools these mortals be."[1]

Demetrius is here placed in the attitude of a lawyer pleading for his fee. In law, the fee is usually a recompense for the pleading. In other words, a reward given to the counselor or attorney, for the execution of his office or by way of recompense for his professional services.[2] Fees differ from costs, in that the former are a recompense for the services rendered, while the latter are but an indemnity for money expended or laid out.[3]

---

[1] Midsummer Night's Dream, Act III, Scene II.

[2] Cowel, Bouvier.

[3] 9 Wheat. 262.

According to Halliwell-Phillipps, the phrase had the specific meaning of "three kisses." Rolfe's Midsummer Night's Dream, p. 182, notes.

The grasping quality of some attorneys is referred to, in All's Well That Ends Well (Act II, Scene II), as follows: "*Clo.* As fit as ten groats is for the hand of an attorney."

Richard tells Anne, in King Richard III: "*Glo.* . . now thy beauty is propos'd my fee, My proud heart sues and prompts my tongue to speak." (Act I, Scene II.)

On promising to circulate the false rumor of his brother's bastardy, Buckingham tells Gloster, in King Richard III: "*Buck.* Doubt not, my lord; I'll play the orator, As if the golden fee, for which I plead, Were for myself." (Act III, Scene V.)

Ulysses said, in Troilus and Cressida, that "supple knees feed arrogance, and are the proud man's fees." (Act III, Scene III.)

In the dialogue between Mercutio and Romeo, in Romeo and Juliet, in his reference to Queen Mab, Mercutio, after describing her state, said: "And in this state she gallops, night by night, Through lovers' brains and then they dream of love; . . O'er lawyers' fingers, who straight dream on fees." (Act I, Scene IV.)

Tamora, in Titus Andronicus, considers the rape of Lavinia, as the fee due her sons, when she denies her interference to save her, in these words:

"*Tam.* So should I rob my sweet sons of their fee:
No, let them satisfy their lust on thee." (Act II, Scene III.)

Sec. 57. Parent's consent to child's marriage.—

"*Ege.* Enough, enough, my lord; you have enough;
I beg the law, the law upon his head.—
They would have stolen away, they would, Demetrius,
Thereby to have defeated you and me:
You, of your wife; and me of my consent;
Of my consent that she should be your wife."[1]

In everything that relates to the domestic relations the English common law has a great superiority over the law of ancient Greece and Rome. Under the law of ancient Greece and Rome, the parental power continued not only during the child's minority, but during its entire life. The child could not marry without the consent of the parent;[2] whatever he acquired, he acquired for the benefit of the parent, and, in fact, the child was regarded by the

---

The Fool, in King Lear, speaks of the "breath of an unfee'd lawyer." (Act I, Scene IV.)

Lucrece, in her complaint to Opportunity, which accomplished her ruin, said:

"When truth and virtue have to do with thee,
A thousand crosses keep them from thy aid:
They buy thy help, but Sin ne'er gives a fee." (911, 913.)

In Venus and Adonis, the following occurs: "'Good night,' quoth she; and, ere he says, 'Adieu,' The honey fee of parting tender'd is." (537, 538.)

The Poet concludes, on Venus lost plea to Adonis:

"But all in vain; good queen, it will not be:
She hath assay'd as much as may be proved;
Her pleading hath deserved a greater fee." (607, 609.)

Referring to Southampton's freedom from the Tower, the CXX Sonnet proceeds:

"But that your trespass now becomes a fee;
Mine ransoms yours, and yours must ransom me." (13, 14.)

[1] Midsummer Night's Dream, Act IV, Scene II.

[2] St. John's History of Manners & Customs of Ancient Greece, 120-125; Voyage du Anarcharis en Grece, iii, c. 26; Taylor's Elements of Civil Law, 395, 403.

law, rather as property of the parent, than in the light of a rational human being.[1]

In ecclesiastic law, in England, the want of the parent's consent to the marriage of a child was *impedimentum impeditivum,* or such an impediment as threw an obstruction in the way of the celebration of the marriage, but it was not an *impedimentum dirimens,* or such an impedimen as would avoid a marriage once solemnized.[2] At common law, in England, the marriage of infants even, provided they had arrived at years of consent, was held to be valid, as great mischiefs were found to grow out of the rule that marriages could be avoided, when solemnized without the consent of the parent.[3]

But in presenting the rule obtaining in ancient Greece, the Poet was right in making the consent of the parent essential to a valid marriage of the child, so Egeus had a right to claim that his consent was essential to the marriage of his daughter.

Sec. 58. Limitation of municipal law.—

"*Lys.* . . . Our intent was, to be gone from Athens,
where we might be,
Without the peril of the Athenian law."[4]

The Old Athenian, in Timon of Athens, in refusing his consent to the marriage of his daughter to Lucillius, unless he brought a proper marriage portion, said: "*Old. Ath.* If in her marriage my consent be missing, I call the Gods to witness, I will choose mine heir from forth the beggars of the world, and dispossess her all." (Act I, Scene I.)

Simonides, in Pericles, Prince of Tyre, emphasizes the necessity for his consent to his daughter's marriage, with Pericles, when he said:

"*Sim.* . . . Will you, not having my consent, bestow,
Your love and your affections on a stranger?"
(Act II, Scene V.)

[1] 2 Kent's Comm. (12th ed.), 205.

[2] 1 Bishop's Mar. & Div. (4th ed.), 293.

[3] *Ante idem.*

[4] Midsummer Night's Dream, Act IV, Scene I.

The Poet here recognizes that the validity of a rule of municipal law depends upon its being enforced within the limits of the municipality where it is invoked. The rule of law invoked against Lysander and Hermia, was a rule of municipal law, as distinguished from international law. The former laws apply only to particular municipalities or districts, while the latter obtain, even among different states or nations.[1]

[1] 1 Bl. Comm 44.

CHAPTER VIII.

"LOVE'S LABOUR'S LOST."

Sec. 59. Term—Subscribing to Oath.
60. Decrees.
61. Penalty of the Law.
62. Attainder.
63. Taken "With the Manner."
64. "In Manner and Form."
65. Venue and Offense Charged.
66. Inheritance—Dowry.
67. Duties of Solicitor.
68. Surety.
69. Title.
70. Common—Severalty.
71. Crime of Perjury.
72. Denial of Receipt.
73. Specialities—Acquittances.
74. Apparitors—Duties of.
75. Enfranchising one.
76. Treason.
77. "Quillets" of the Law.
78. "Statute-caps."
78a. Slander dependent upon hearer's attitude.

Sec. 59. Term—Subscribing to oath.—

"*King.* You three, Biron, Dumain and Longaville,
Have sworn for three years' term to live with me,
My fellow-scholars, and to keep those statutes,
That are recorded in this schedule here:
Your oaths are past and now subscribe your names;
That his own hand may strike his honor down,
That violates the smallest branch herein:
If you are arm'd to do, as sworn to do,
Subscribe to your deep oath and keep it too."[1]

As an oath can only be administered by some one authorized to administer oaths,[2] and the form of taking the oath is not here presented, the Poet purposely accounts for this absence by saying that the oaths have already been

[1] Love's Labour's Lost, Act I, Scene I.

[2] 2 McLean, Cr. Cases, 135.

taken and the names are now but to be subscribed thereto. This verse abounds in proper legal phrases. One "subscribes" to an instrument of writing, when he places his signature at the bottom of the engagement or writing.[1] "Term," in the law of contracts, is the space of time given for the discharge of an obligation.[2] Statutes, until recorded are not usually enforceable,[3] hence the rules of conduct here are announced as duly recorded. Indeed, the statute law, was understood as the written or recorded laws, to distinguish it from the unwritten or unrecorded laws, at common law.[4]

Sec. 60. Decrees.—

"*Biron.* . . . Give me the paper, let me read the same;
And to the strict'st decrees, I'll write my name."

. . . . . .

"*King.* We must, of force, dispense with this decree,
She must lie here, on mere necessity."[5]

Decrees, as generally understood, are sentences or judgments of a court of equity, as distinguished from a court of law,[6] but this is not the sense in which the term is used in this verse, for here the word is used as applying to a legislative act, not to a judgment of a court. In some countries, acts of the legislative branch of Government, or of the sovereign, which have the force and effect of laws, are spoken of as decrees,[7] such as the Berlin and Milan decrees and this is the meaning in which the word is used here.

[1] From Latin, *sub.* under and *scribo*, to write.
[2] Bouvier's Law Dictionary.
[3] 1 Bl. Comm. 85, 86; 4 Coke, 76.
[4] Bouvier's Law Dictionary.
[5] Love's Labour's Lost, Act I, Scene I.
[6] 7 Comyns Dig. 445.
[7] Bouvier's Law Dictionary.

Sec. 61. Penalty of the law.—

"*Biron.* (Reads) *That no woman shall come within a mile of my court*—And hath this been proclaim'd?
Long. Four days ago.
Biron. Let's see the penalty. (Reads) *On pain of losing her tongue.*—Who devis'd this?
Long. Marry, that did I.
Biron. Sweet lord, and why?
Long. To fright them hence, with that dread penalty.
Biron. A dangerous law against gentility."[1]

The idea is expressed in this colloquy that the law would not be effective until it was properly proclaimed as a law and this, of course, is true.[2] The penalty is then adverted to and the avowed purpose is stated to be to deter the violation of the rule prescribed by the edict. This

---

The following occurs, in Love's Labour's Lost (Act IV, Scene III):

"*Biron.* As true, we are, as flesh and blood can be,
The sea will ebb and flow, heaven show his face;
Young blood will not obey an old decree:
We cannot cross the cause why we were born;
Therefore, of all hands must we be foresworn."

In Merchant of Venice (Act I, Scene II) the effect of a decree, contrary to the inclinations of youth, is spoken of as follows: "*Por.* The brain may devise laws for the blood; but a hot temper leaps over a cold decree; such a hare, is madness, the youth, to skip o'er the meshes of good counsel, the cripple."

Complaining of his past treatment, the King said to his son, in 2 Henry IV (Act IV, Scene IV): "*K. Hen.* . . . Give that which gave thee life unto the worms; pluck down my officers; break my decrees."

In King Richard II, in exiling Bolingbroke and Norfolk, the King said:

"*K. Rich.* Let them lay by their helmets and their spears,
And both return back to their chairs again;
Withdraw with us; and let the trumpets sound,
While we return these dukes what we decree."
(Act I, Scene III.)

[1] Love's Labour's Lost, Act I, Scene I.

[2] 1 Stephen, Comm. 25; 10 Pet. 18. A law not properly promulgated or proclaimed, would be no law. Bouvier's Law Dictionary.

is the object of all penal provisions, to deter those upon whom the law is to operate from a violation of its provisions.[1] But if the penalty is too harsh for the offense prescribed, it is not generally, a good law, for it will be apt to be violated and the penalty dispensed with, hence Biron concludes that this harsh provision is "a dangerous law."

Sec. 62. Attainder.—

"*Biron.* . . . I am foresworn on mere necessity.—
So to the laws at large I write my name:
And he that breaks them in the least degree,
Stands in attainder of eternal shame."[2]

"Attainder" was that extinction of civil rights and capacities which took place, at common law, whenever a person who had committed treason or other felony, received the sentence for his crime.[3] Attainder was either by confession, in court; by verdict, or by process of outlawry, in case of his flight.[4] The effect of an attainder was that the felon's estate, real and personal, was forfeited; his blood was corrupted, so that nothing passed by inheritance, to, from or through him, and he was unable to sue to enforce any right in a court of justice.[5] Of course the player spoke extravagantly in the use of this term as a penalty for the offense considered.

The King, in Hamlet, mentions "How dangerous is it, that this man goes loose;" but he concludes, "Yet must not we put the strong law on him." (Act IV, Scene III.)

[1] 1Kent's Comm. 467; 1 Bl. Comm. 88; 1 Comyns Dig. 444.

[2] Love's Labour's Lost, Act I, Scene I.

[3] 1 Bishop, Criminal Law, 641; 1 Stephen, Comm. 408.

[4] Coke, Litt. 391.

[5] 6 Coke, 63a, 63b; Coke, Litt. 130a; 1 Bishop, Criminal Law, 641; 2 Gabbett, Criminal Law, 538. Attainder is not known in the United States. 4 Kent's Comm. 413, 420.

Further on, in the same play, Rosalind said to Biron:

"*Ros.* You must be purged too, your sins are rank;
You are attaint with faults and perjury;
Therefore, if you my favor mean to get,
A twelvemonth shall you spend, and never rest,
But seek the weary beds of people sick." (Act V, Scene II.)

Replying to the accusation of Bagot, the Duke of Aumerle said:

"*Aum.* What answer shall I make to this base man?
Shall I so much dishonor my fair stars,
On equal terms to give him chastisement?
Either I must or have mine honour soiled,
With the attainder of his slanderous lips." (King Richard II, Act IV, Scene I.)

Referring to the father of Richard Plantagenet, Somerset asks him, in 1' Henry VI: "*Som.* . . . by his treason stand'st not thou attainted, Corrupted and exempt from ancient gentry?"

And Plantagenet replies: "*Plan.* . . My father was attached, not attainted; condemn'd to die for treason, but no traitor." (Act II, Scene IV.)

Somerset flouts the alleged treason of his father in the face of Richard Plantagenet, in 1' Henry VI, as follows: "*Som.* . . His trespass yet lives guilty in thy blood, And, till thou be restor'd thou art a yeoman." (Act II, Scene IV.)

Mortimer, referring to Richard Plantagenet's attainder, in 1' Henry VI, said: "And even since then hath Richard been obscur'd, Deprived of honour and inheritance." (Act II, Scene V.)

In remitting the attainder of Richard Plantagenet, Henry VI said: "*K. Hen.* . . Therefore, my loving lords, our pleasure is, That Richard be restored to his blood." (Act III, Scene I.)

King Henry tells Suffolk, in 1' Henry VI: "*K. Hen.* . . My tender youth was never yet attaint, With any passion of inflaming love." (Act V, Scene V.)

In 2' Henry VI, Hume is made to say of the Duchess of Gloster: "*Hume.* Hume's knavery will be the duchess' wreck; And her attainture will be Hume's fall." (Act I, Scene II.)

The vicious Queen Margaret is made to say to the duke of Gloster, on the arrest of his wife: "*Q. Mar.* Gloster, see here the tainture of thy nest; And look, thyself be faultless, thou wert best." (2' Henry VI, Act II, Scene I.)

The duke of Gloster said to his unfortunate wife, in 2' Henry VI: "*Glo.* . . Ah, Nell, forbear; thou aimest all awry; I must offend, before I be attainted." (Act II, Scene IV.)

Sec. 63. Taken with the manner.

"*Cost.* The matter is to me sir, as concerning Jaquenetta. The manner of it is, I was taken with the manner."[1]

These lines refer to an arrest upon "hue and cry," when the thief is found with the stolen property on his person. Of this term Halliwell quotes from Termes de la Ley: "Maynour is when a thief has stolen and is followed with Hue and Cry, and taken, having that upon him, which he stole, and it is called Maynour. And so we used to say, when we find one doing of an unlawful act, that we took him with the Maynour, or Manner."[2]

The Scrivener, in presenting the indictment, after Hasting's death, in King Richard III, is made to say: "*Scriv.* And yet within these five hours, Hastings liv'd, Untainted, unexamined, free, at liberty." (Act III, Scene VI.)

Dissembling, on seeing Lord Hasting's head, Richard II said, in King Richard III': "*Glo.* So smooth he daub'd his vice, with show of virtue, That, his apparent open guilt omitted—I mean his conversation with Shore's wife—He lived from all attainder of suspect." (Act III, Scene V.)

Speaking of the Cardinal's act in the trial of Buckingham, for treason, a gentleman is made to say: "*Gent.* 'Tis likely, by all conjectures; First, Kildare's attainder, then deputy of Ireland." (Act II, Scene I.)

Alexander tells Cressida, in Troilus and Cressida, speaking of Troilus: "*Alex.* . . there is no man hath a virtue that he hath not a glimpse of; nor any man an attaint, but he carries some stain of it." (Act I, Scene II.)

Addressing his friend, in the LXXXVIII' Sonnet, the Poet said:

"Upon thy part I can set down a story
Of faults conceal'd, wherein I am attainted." (6, 7.)

[1] Love's Labour's Lost, Act I, Scene I.

[2] See Tomlin's Law Dictionary; Bouvier's Law Dictionary.

For an interesting case, where a thief was taken with the Manour, see Year Book 30 and 31 Edw. 1 (Hor. Ed. 1863), p. 512, where a woman had committed burglary and larceny and was taken with the "mainour" and was brought before the justices, with the "mainour."

Sec. 64. "In manner and form."—

"*Cost.* In manner and form following, sir; all those three: I was seen with her in the manor house, sitting with her upon the form and taken following her into the park; which, put together is, in manner and form following."[1]

These terms are used not only in indictments, in setting out the charging part of the offense committed, at common law, but also in other formal legal documents. The play upon the formal words, in this instance, is by the use of another legal term, "manor house." In the English law, "Manor" signified a tract of land originally granted by the King to a person of rank,[2] part of which (*terrae tenementales*), was given by the "lord of the manor," to his followers or vassals, and the rest was retained by him under the name of his demesnes, or *terrae*

In Henry IV, (Act II, Scene IV) Prince Hal thus refers to Falstaff's having been taken with the manner:

"*P. Hen.* O villain, thou stolest a cup of sack eighteen years ago and wert taken with the manner, and ever since thou hast blushed extempore."

Manner, is no doubt from the French word *manier*, and when used as it is in this verse means about the same that the words imply to arrest a thief and find the stolen goods on his person. "Taken with the manner," means that he was arrested with the goods upon his person and as "recent possession of stolen property" raises a strong implication, in law, of the guilt of the person in whose possession the stolen property is found, so to be "taken with the manner" would be presumptive evidence of the guilt of Falstaff in the instance referred to.

Commenting upon the right of arrest of those criminals who were taken in the act, Lord Coke said: "being taken with the manner, that is, with the thing stolen in his hand, which Bracton and Britton call *factum manifestum* (Bracton lib. 111, fol. 12; Britton, fol. 22), and so felons, openly known and notorious, they were not bailable." (2 Inst. 189.)

And see II Reeve's History Eng. Law, p. 418.

[1] Love's Labour's Lost, Act I, Scene I.

[2] Coke, Litt. 58, 108; 2 Rolle, Abr. 121.

dominicales. The whole fee was called a lordship, or barony, and the court appendant to the "manor house" was called the court-baron.[1] No new "manors" were created in England after the enactment of the statute *Quia Emptores,* prohibiting subinfeudation.[2]

Sec. 65.—Venue and offense charged.—

"*King* (*Reads*). The time when? About the sixth hour; when beasts most graze, birds best peck, and men sit down to that nourishment, which is called supper. So much for the time when. Now for the ground which; which, I mean, I walked upon; it is ycleped thy park. Then for the place where; where, I mean, I did encounter that obscene and most preposterous event, that draweth from my snow-white pen the ebon-coloured ink, which here thou viewest beholdest, surveyest or seest; but to the place where; It standeth north-north-east and by east from the west corner of thy curious knotted garden; there did I see that low spirited swain, that base minnow of thy mirth, sorted and consorted, contrary to thy established proclaimed edict and continental cannon, etc."[3]

This letter follows, in a satirical and ridiculous way, the charging part of a common law indictment, in setting forth the venue or the place where the offense was committed and winds up, by charging the offense contrary to the form of the "established proclaimed edict," like an indictment ended, in charging the commission of the offense "contrary to the form of the statute," etc.[4] At common law, in setting forth an offense, some certain place

[1] Bouvier's Law Dictionary.

[2] This statute was passed in 1290. Tiedeman, R. P. (3 Ed.), Sec. 23; 1 Washburn, R. P. 30.

[3] Love's Labour's Lost, Act I, Scene I.

[4] These legal terms were used as terms of art, at common law, for which none others were found to so fully fill the same office, in charging offenses known to the law. 4 Bl. Comm. 301; 1 Chitty, Cr. Law, 230; Hawkins, Pl. Cr. b, 2, c, 25, Sec. 57.

had to be alleged as the place of occurrence of each traversable fact.[1] The place was set forth with great detail, as in this form used by the Poet, or by use of similar legal phrases, to designate the place, after which the offense was charged, as here, it is stated that he "sorted and consorted," which is also charged to have been "contrary to thy established proclaimed edict and continental cannon," meaning that it was "contrary to the form of the statute," as the offense would be charged at common law.[2]

Sec. 66.—Inheritance, Dowry.—

"*Boyet.* Now, madam, summon up your dearest spirits;
Consider who the king, your father, sends;
To whom he sends; and what's his embassey;
Yourself, held precious in the world's esteem,
To parley with the sole inheritor
Of all perfections that a man may owe,
Matchless Navarre; the plea of no less weight
Than Aquittain; a dowry for a queen."[3]

Boyet here impresses the Princess with the importance of her embassy, by complimenting her own prowess and prerogatives and by emphasizing the no less royal importance of the King of Navarre, to whom the public message from her father's court, is borne. Then by way of further suggestion of the importance of the mission, it is reminded that the title of Aquittain is involved, which is, in itself, a "dowry for a queen." An inheritance, is a perpetuity in land to a man and his heirs, or the right to succeed to the estate of a person who dies intestate.[4] Navarre is spoken of as the "inheritor" of "the perfections that a man may owe," meaning that he inherited these perfections, which were transmitted to him, by his father. "Dowry" was the wedding portion which a bride brought

[1] Comyns Dig. *Pleader*, c. 20.
[2] Coke, Litt. 125.
[3] Love's Labour's Lost, Act II, Scene I.
[4] Littleton, Sec. 9.

her husband.[1] And the value of Aquittain is here enhanced as being fit for a queen.

---

[1] Coke, Litt. 31.

King John is made to say, to Phillip, of France: "If that the Dauphin there, thy princely son, Can in this book of beauty read, I love, Her dowry shall weigh equal with a queen." (Act II, Scene I.)

As an apt illustration of the frequency with which legal terms are correctly used by the Poet, when the necessity therefor occurs, note the following references to dowry, in Taming Of The Shrew:

"*Gre.* I had as lief take her dowry, with this condition—to be whipped at the high-cross every morning." (Act I, Scene I.)

"*Hor.* Here is a gentleman, whom by chance I met, upon agreement from us to his liking, will undertake to woo curst Katharine; yea, and to marry her, if her dowry please." (Act I, Scene II.)

"*Pet.* Then tell me—if I get your daughter's love, What dowry shall I have, with her to wife?"

"*Bap.* After my death, the one-half of my lands; and, in possession, twenty thousand crowns."

"*Pet.* And, for that dowry, I'll assure her of her widow-hood." (Act II, Scene I.)

"*Pet.* Your father hath consented that you shall be my wife; your dowry 'greed on; and will you, nill you, I will marry you." (Act II, Scene I.)

"*Bap.* And he, of both, that can assure my daughter greatest dower, shall have Bianca's love." (Act II, Scene I.)

"*Tra.* My father is here looked for every day, To pass assurance of a dower in marriage." (Act IV, Scene II.)

"*Bap.* And, therefore, if you say no more than this, That like a father you will deal with him, And pass my daughter a sufficient dower, The match is fully made, and all is done." (Act IV, Scene IV.)

"*Pet.* Wonder not, nor be not grieved; she is of good esteem, Her dowry wealthy and of worthy birth." (Act IV, Scene V.)

"*Bap.* I will add unto their losses, twenty thousand crowns; Another dowry to another daughter, for she is changed as she had never been." (Act V, Scene II.)

In King John, the Earl of Pembroke said to Lord Salisbury: "Stay yet, Lord Salisbury, I'll go with thee, And find the inheri-

tance of this poor child, His little kingdom of a forced grave." (Act IV, Scene II.)

The Archbishop of Canterbury, in Henry V, said to the King: "*Cant.* . . in the book of Numbers is it writ—When the son dies, let the inheritance descend unto the daughter." (Act I, Scene II.)

Gloster, speaking of the offer of his daughter to the king, by the Earl of Armagnac, in 1' Henry VI, said: "*Glo.* Proffers his only daughter to your grace, in marriage, with a large and sumptuous dowry." Her beauty and the value of her dower, He doth intend she shall be England's queen." (Act V, Scene I.)

. . . . . .

Contesting for the several hands of their favorites for the King, Exeter and Suffolk, in 1' Henry VI, said: "*Exe.* Besides, his wealth does warrant liberal dower; While Reignier sooner will receive, than give. *Suff.* A dower, my lords; disgrace not so your king, That he should be so abject, base and poor, To choose for wealth and not for perfect love." (Act V, Scene V.)

In 2' Henry VI, the peasant, Iden, said: "*Iden.* This small inheritance, my father left me, Contenteth me and is worth a monarchy." (Act IV, Scene X.)

In 3' Henry VI, York asserts title to the crown, in the following language: "*York.* 'Twas my inheritance as the earldom was." (Act I, Scene I.)

The Senators urge Alcibiades to show mercy and deny that crimes are hereditary, in Timon of Athens:

"1 *Sen.* All have not offended;
For those that were, it is not square to take,
On those that are, revenges; crimes, like lands,
Are not inherited." (Act V, Scene V.)

Lear asks the duke of Burgundy: "What, in the least, Will you require in present dower with her, Or cease your quest of love," in discarding his daughter, Cordelia. (Act I, Scene I.)

King Lear before division of his property among his daughters said: "*Lear.* We have this hour a constant will to publish, Our daughters several dowers, that future strife may be prevented now." (Act I, Scene I.)

And to Cordelia, he decrees: "Thy truth, then, be thy dower." *idem.*

Cleon tells the Lord, in Pericles, Prince of Tyre, that

"One sorrow never comes, but brings an heir,
That may succeed as his inheritor." (Act I, Scene IV.)

Sec. 67. Duties of solicitor.—

"*Prin.* In that behalf, bold of your worthiness, we single you,
As our best moving, fair solicitor:
Tell him, the daughter of the king of France,
On serious business, craving quick dispatch,
Importunes personal conference with his grace;
Haste, signify so much; while we attend
Like humble visaged suitors, his high will."[1]

The audience was thus sought by means of a solicitor. A solicitor is a person whose business it is to be employed in the care and management of law suits[2] and especially those pending in the English court of chancery. The solicitor, like the attorney, is required to act with perfect good faith, toward his client, or the suitor that he represents. Here, the Princess not only adopted the solicitor to state the necessity for her audience, but adopted the attitude of her solicitor's client, in that she and her associates, "like humble visaged suitors," would await his will. A suitor, of course, is one who is a party to a lawsuit;[3] the character of waiting, with an humble visage, denotes the keen perception of the lawyer, used to seeing clients waiting upon the pleasure of the court, for no doubt, at Westminster, many such could be seen, in the Poet's day.[4]

Sec. 68. Surety.—

"*King.* . . Madam, your father here doth intimate,
The payment of a hundred thousand crowns;

---

[1] Love's Labour's Lost, Act II, Scene I.

[2] Bouvier's Law Dictionary.

[3] Bouvier's Law Dictionary.

[4] II Reeve's Hist. Eng. Law, 401, *et sub.*

To follow out the reference of the Princess' attitude to a suitor, in a court, when the king arrives, she said: "Vouchsafe to read the purpose of my coming, and suddenly resolve me in my suit." (Love's Labour's Lost, Act II, Scene II.)

Desdemona tells Cassio, in Othello, the Moor of Venice: "Therefore, be merry, Cassio; For thy solicitor shall rather die, Than give thy cause away." (Act III, Scene III.)

Being but the one-half of an entire sum,
Disbursed by my father in his wars.
But say, that he, or we, (as neither have)
Received that sum; yet there remains unpaid,
A hundred thousand more; in surety of the which,
One part of Aquittain is bound to us,
Although not valued to the money's worth."[1]

The idea that the country of Aquittain could be bound to the King of Navarre, as a "surety," is not, speaking in strictly legal parlance, a proper term, but the sense of the suretyship here spoken of is that the country was held to indemnify the King of Navarre against loss on the debt referred to. A surety is usually a person who binds himself to the payment of a certain sum of money, or for the performance of something else, for another, who is already bound therefor.[2] The meaning here, of course is, that in lieu of other indemnity, the title of the King of France, to Aquittain, was held to guarantee the King of Navarre against loss on the debt referred to.

---

[1] Love's Labour's Lost, Act II, Scene I.

[2] Bouvier's Law Dictionary.

At the death of King John, Prince Henry said:

"Even so must I run on and even so stop.
What surety of the world, what hope, what stay,
When this was now a king, and now is clay."

(Act V, Scene VII.)

In King Richard II, Bolingbroke, after his coronation, thus addresses his Lords:

"*Boling.* Lords, you that are here under our arrest,
Procure your *sureties* for your days of answer."

(Act IV, Scene I.)

In 2' Henry IV, Lord Mowbray said, to Earl of Northumberland:

"*Mow.* . . The gentle archbishop of York is up,
With well-appointed powers; he is a man,
Who with a double surety binds his followers."

(Act I, Scene 1.)

In 2' Henry VI, Queen Margaret thus addresses York: "*Q. Mar.* Call hither Clifford; bid him come amain, to say, if that the

Sec. 69. Title.—

"*King.* But that, it seems, he little purposeth,
For here he doth demand to have repaid,
A hundred thousand crowns; and not demands,
On payment of a hundred thousand crowns,
To have his title live in Aquitain."[1]

A title is defined as the means whereby the owner of land hath the just possession of his property.[2] A title enables a man, by right, to assert a property or ownership to land or other kind of property and to recover the possession thereof, if not in possession.[3] The King of France, having pledged the title that he had to Aquittain, here offered on payment of the certain sum remaining unpaid, to accept a full release and be restored to his title. If this offer was not accepted, he would assert his title, in any event.

---

bastard boys of York, Shall be the surety for their traitor father." (Act V, Scene I.)

The following occurs between Aenas and Agamemnon, in Troilus and Cressida:

"*Aena.* May one, that is a herald and a prince, Do a fair message to his kingly ears?

Agam. With surety stronger than Achilles arm, 'Fore all the Greekish heads, Which, with one voice, call Agamemnon head and general." (Act I, Scene II.)

On the arrest of Coriolanus, Senators and Patricians, stand surety for him as follows: "*Sen.* & *Pat.* We'll surety him." (Act III, Scene I.)

Iago tells Roderigo, in Othello:

"*Iago.* I know not if't be true,
But I, for mere suspicion in that kind,
Will do, as if for surety." (Act I, Scene III.)

Referring to his friend's love, in the CXXXIV' Sonnet, the Poet said:

"He learned but surety-like to write for me,
Under that bond that him as fast doth bind." (7, 8.)

[1] Love's Labour's Lost, Act II, Scene I.

[2] Coke, Litt. 345; 2 Bl. Comm. 195.

[3] *Ante idem.*

Sec. 70. Common-Severalty.—

"*Mar.* Not so, gentle beast;
My lips are no common, though several they be."[1]

This is a play upon terms familiar to the student of real property. The speaker's lips are compared to an estate which either may be held in common, or in severalty. An estate held in severalty is one held by a tenant in his own right alone, without any one else being joined with him during the continuance of the estate,[2] while an estate in common is one held by two or more persons at the same time, although by several and distinct titles.[3] The right of easement known as "common appendant," which was the right of pasturage annexed to land, on which the owner had the privilege of feeding his beasts on the waste of the manor,[4] is probably the reference made in the use of the first term, from the preceding verse. This right, by usage could be limited to some certain number of cattle, or otherwise to the number of cattle owned by the owner of the right.[5]

The earl of Salisbury, thus explains to king Henry, his reasons for supporting the title of York, to the crown, in 2' Henry VI:

"*Sal.* My lord, I have considered with myself,
The title of this most renowned duke;
And in my conscience do repute his grace,
The rightful heir to England's royal seat."
(Act V, Scene I.)

York claims title to the crown, in 3' Henry VI, as follows:

"*York.* Will you, we show our title to the crown?
If not, our swords shall plead it in the field."
(Act I, Scene I.)

And Henry replies:

"*K. Hen.* What title hast thou, traitor, to the crown?
Thy father was, as thou art, duke of York." *idem.*

[1] Love's Labour's Lost, Act II, Scene I.

[2] 2 Bl. Comm. 179; Tiedeman, R. P. (3' Ed.) 26, 174.

[3] 2 Bl. Comm. 191; 1 Preston, Est., 139.

[4] 6 Coke, 59; 1 Rolle, Abr. 396.

[5] 2 Dane, Abr. 611; 2 Mood. & R. 205; 4 Coke 36; Tiedeman, R. P. (3' Ed.) Secs. 424, 426.

Sec. 71. Crime of perjury.—

"*Prin.* . . . I hear, your grace hath sworn out housekeeping;
'Tis deadly sin to keep that oath, my lord, and sin to break it:
. . . . You will the sooner that I were away;
For you'll prove perjured, if you make me stay."[1]

. . . . . .

"*Prin.* This field shall hold me; and so hold your vow;
Nor God, nor I, delight in perjur'd men. . . . .
As the unsullied lilly, I protest;
A world of torments, though I should endure,
I would not yield to be your house's guest;
So much I hate a breaking cause to be
Of heavenly oaths, vow'd with integrity. . . . . .
Biron. Thus pour the stars down plagues for perjury."[2]

It is inaccurate to treat the violation of the oath subscribed to by the King and his associates as "perjury," because the same was not made in a judicial proceeding, in due course of justice, which is and was, at common law, an essential of the crime. Sir Edward Coke thus defined this crime at common law, saying that it is committed "where a lawful oath is administered in some judicial proceeding or due course of justice, to a person who swears wilfully, absolutely and falsely, in a matter material to the issue or point in question."[3] It is doubtful if the violation of the oath subscribed to by the King and his associates, in this instance would have constituted a crime at common law, at all, or, if so, it would have amounted to the making of a false affidavit. But of course the Princess and her associates aggravate the offense, for a purpose and refuse the invitation to be a guest of the King, so

[1] Love's Labour's Lost, Act II, Scene I.

[2] Love's Labour's Lost, Act V, Scene II.

[3] 3 Coke Inst. 164; 2 Bishop, Criminal Law, 860; Sherwood's Cr. Law, 391. This would be an extra-judicial oath, or one taken without authority of law. Though binding *in foro conscientia*, such oaths when violated, would not render the person so violating, liable for perjury.

that they may not be the cause of his violating his oath, which is treated as of the same solemnity, before heaven, as if criminal before the law. And Biron concludes that this is a proper punishment for the offense committed, before heaven, if its the only punishment to be inflicted.

Sec. 72. Denial of receipt.—

"*Prin.* You do the king, my father, too much wrong,
And wrong the reputation of your name,
In so unseeming to confess receipt,
Of that which hath so faithfully been paid."[1]

A receipt is generally defined to be a written acknowledgement of the payment of money, or of the delivery and

---

In King John, Constance is made to say: "Nay, rather, turn this day out of the week; this day of shame, oppression, perjury. . . . Arm, arm, you heavens, against these perjur'd kings." (Act III, Scene I.)

Richard III, after his dream, before the battle with Richmond, exclaims:

"*K. Rich.* . . Perjury, perjury, in the highest degree; . . .
All several sins, all us'd in each degree."
(Act V, Scene III.)

Cæsar tells Euphronius, in Antony and Cleopatra:

"*Cæs.* But want will perjure the ne'er touch'd vestal."
(Act III, Scene X.)

In Romeo and Juliet (Act II, Scene II), Juliet tells Romeo that Jove laughs "at lover's perjuries."

Othello cautions Desdemona before killing her: "Sweet soul, take heed; Take heed of perjury, thou'rt on thy death bed." (Act V, Scene II.)

In the CLII' Sonnet, the following occurs:

"But why of two oaths' breach do I accuse thee,
When I break twenty: I am perjured most.
. . . . . .
For I have sworn thee fair; more perjured I,
To swear against the truth so foul a lie." (5, 6, 13, 14.)

In the Passionate Pilgrim, occurs the following:

"Did not the heavenly rhetoric of thine eye,
'Gainst whom the world could not hold argument,
Persuade my heart to this false perjury?" (III, 1, 3.)

[1] Love's Labour's Lost, Act II, Scene I.

acceptance of something in lieu thereof.[1] While subject to explanation by parol evidence, unlike other written instruments,[2] receipts are sometimes useful, as evidence of facts collateral to those things set forth in the receipt; they establish the payment made and whatever inference may be legally drawn from the fact of the payment made will be supported by the receipt itself.[3] A denial of one's receipt is like the denial of any other obligation or acknowledgment, over one's signature and hence the conclusion of the Princess, that the King wronged the reputation of his name, in refusing to confess the receipt of a sum that had "so faithfully been paid."

Sec. 73. Specialties—Acquittances.—

"*Prin.* We arrest your word:
Boyet, you can produce acquittances,
For such a sum, from special officers,
Of Charles, his father. . . . .
Boyet. So please your grace, the packet is not come,
Where that and other specialties are bound,
Tomorrow you shall have a sight of them."[4]

An acquittance, in the law of contracts, is a written agreement to discharge a party from his engagement to pay a given sum of money.[5] Like a receipt, it is evidence of the payment, but it differs from a release, or specialty, in that the latter is always under seal,[6] while an acquittance is not under seal. A specialty is a writing containing some agreement, which is sealed and delivered.[7] In the sense in which the word is used in this verse, it is a writing sealed and delivered, which is given as evidence

[1] Bouvier's Law Dictionary.
[2] 1 Pet. C. C. 182; 2 Johns. N. Y. 378.
[3] 15 Johns. N. Y. 479.
[4] Love's Labour's Lost, Act II, Scene I.
[5] Bouvier's Law Dictionary.
[6] Pothier, Oblig. n. 781; Coke, Litt. 212a, 273a; 3 Salk. 298; 1 Rawle (Pa.) 391.
[7] Bouvier's Law Dictionary.

of the payment of a debt, in which the same is specially mentioned.[1] Although a seal may not be called for therein, if an instrument is executed with a seal, it is a specialty, while it is not a specialty if the seal is omitted.[2] The Princess does not dignify the receipt for this debt, by placing it on the higher plane with sealed instruments, but Boyet recognizes the distinction existing in the law between the two and promises on arrival of the packet, the sight of a sealed instrument acknowledging receipt of the debt.

Sec. 74. Apparitors—Duties of.—

"*Biron.* . . . Dread prince of plackets, king of codpieces,
Sole imperator and great general
Of trotting paritors."[3]

Cupid is here likened to the general of a body of apparitors, whose movements and actions he governs, as he does those of other mortals. An apparitor was an officer

[1] Bacon's Abr. Obligation, A.

[2] 2 Coke, 5a; Perkins, 129.

Bassanio acknowledges his obligation to Portia, for the acquittance given from the Jew, in the following verse: "Most worthy gentleman, I and my friend, Have by your wisdom been this day acquitted, Of grievous penalties; in lieu whereof, Three thousand ducats due unto the Jew, We freely cope your courteous pains withal." (Merchant of Venice, Act IV, Scene I.)

In Taming of the Shrew (Act II, Scene I), Petruchio is made to say:

"Let specialties be therefore drawn between us,
That covenants may be kept, on either hand."

A Lord, in Timon of Athens, speaking of his generosity, said: "*2 Lord.* . . no gift to him, but breeds the giver a return exceeding all use of quittance." (Act I, Scene I.)

And the King tells Laertes, in Hamlet: "Now must your conscience my acquittance seal, And you must put me in your heart for friend." (Act IV, Scene VII.)

[3] Love's Labour's Lost, Act III, Scene I.

of an ecclesiastical court, whose duty it was to serve citations and execute such similar process of the court.[1] In these courts citations were most frequently issued for offenses against chastity and these officers were thus called upon often to serve process in these offenses prompted by Cupid. Hence, the reference, to the God of Love, as the general of this special class of officers.[2]

Sec. 75. Enfranchising one.—

"*Arm.* Sirrah Costard, I will enfranchise thee.
Cos. O, marry me to one Frances: I smell some *l'envoy*, some goose, in this.
Arm. By my sweet soul, I mean, setting thee at liberty, enfreedoming thy person; thou wert immured, restrained, captivated, bound."[3]

As explained by the players in this verse the word "enfranchise" in the law, literally means to set free.[4] Enfranchisement is giving freedom to a person, hence a citizen of London is said to be enfranchised. And, at common law, a villain was said to be enfranchised when he had obtained his freedom from his lord paramount, under the land tenure law.[5] Being the opposite of "immured, restrained," etc., the Poet expresses the legal meaning of the term as it is understood in the law.

---

[1] Bouvier's Law Dictionary.
[2] Rolfe's Love's Labour's Lost, p. 176, notes.
[3] Love's Labour's Lost, Act III, Scene I.
[4] Bouvier's Law Dictionary.
[5] II Coke, 91.

In Antony and Cleopatra, Cleopatra thus addresses Antony:

"*Cleo.* . . Or, who knows,
If the scarce-bearded Cæsar have not sent
His powerful mandate to you, *Do this, or this;*
Take in that kingdom, and enfranchise that;
Perform't, or else we damn thee." (Act I, Scene I.)

In Julius Cæsar, before the assassination, Cassius is made to say:

Sec. 76. Treason.—

"*Biron.* To fast,—to study,—and to see no woman,
Flat treason 'gainst the kingly state of youth."[1]

Treason, in the law, implies a betrayal, or breach of allegiance, amounting to treachery,[2] hence the conclusion that to study and to fast "and to see no woman," is a course so inconsistent with the primary obligations of youth, as to amount to "flat treason." The overt act of making war against a country to which allegiance is due from the person raising arms, is an act of treason,[3] and this course of conduct is so at war with youth, that it could also be considered treason, for this reason, as well.

"*Cas.* Pardon, Cæsar; Cæsar, pardon;
As low as to thy foot doth Cassius fall,
To beg enfranchisement for Publius Cimber."

Having been banished from Rome Publius Cimber lost all his rights and privileges as a citizen of Rome and Brutus and Cassius begged Cæsar not only to admit him to a full pardon, but to likewise restore him to the privileges of his citizenship, or to enfranchise him. (Julius Cæsar, Act III, Scene I.)

[1] Love's Labour's Lost, Act IV, Scene III.
[2] 4 Shars. Bl. Comm. 75.
[3] 2 Chitty, Cr. Law, 60-102; 3 Story, Const. 39.

In King Richard II, the Duke of Norfolk, replies to Bolingbroke:

"*Nor.* . . First, the fair reverence of your highness curbs me,
From giving reins and spurs to my free speech;
Which else would post, until it had return'd
These terms of treason doubled down his throat."
(Act I, Scene I.)

And King Richard II, speaking of Bolingbroke, said:

"*K. Rich.* Tell Bolingbroke (for yond', methinks, he is,)
That every stride he makes upon my land,
Is dangerous treason." (Act III, Scene III.)

The Earl of Worcester, is quoted as saying, in 1' Henry IV:

"*Wor.* . . Suspicion shall be all stuck full of eyes: For treason is but trusted like the fox." (Act V, Scene II.)

Speaking of the treason and attempt to kill him, Henry V, said: "*K. Hen.* . . . Treason and murder, ever kept together, as two yoke-devils sworn to either's purpose, working so grossly in a natural cause, that admiration did not whoop at them: but thou, 'gainst all proportion did bring in, wonder, to wait on treason, and on murder." (Act II, Scene II.)

Speaking to the traitors, who conspired to kill him, Henry V, said: "*K. Hen.* But he, that temper'd thee, bade thee stand up, gave thee no instance why thou should'st do treason, unless to dun thee with the name of traitor." (Act II, Scene II.)

Somerset asks Richard Plantagenet, in 1' Henry VI: "*Som.* . . Was not thy father, Richard, earl of Cambridge, for treason executed in our late king's days?" (Act II, Scene IV.)

Talbot, before Rouen, in 1' Henry VI, is made to say: "*Tal.* France thou shalt rue this treason with thy tears, if Talbot but survive thy treachery." (Act III, Scene II.)

In 2' Henry VI, the king resents the idea that the duke of Gloster was guilty of treason, in the following language: "*K. Hen.* . . Our kinsman, Gloster is as innocent From meaning treason to our royal person, As is the sucking lamb, or harmless dove." (Act III, Scene I.)

Suffolk said to Gloster, in 2' Henry VI: "*Suff.* Nay, Gloster, know, that thou art come too soon, Unless thou wert more loyal than thou art: I do arrest thee of high treason." (Act III, Scene I.)

In attempting to make Gloster the instigator of his wife's treason, Suffolk said, in 2' Henry VI: "*Suff.* . . Smooth runs the water where the brook is deep; And in his simple show, he harbors treason. The fox barks not, when he would steal the lamb." (Act III, Scene I.)

Warwick says of Clarence, after he quit his forces, in 3' Henry VI: "*War.* O, passing traitor, perjur'd and unjust." (Act V, Scene I.)

Speaking of the alleged treason of Buckingham, King Henry VIII, is made to say: "*K. Hen.* He is attach'd; call him to present trial; if he may find mercy in the law, 'tis his; if none, let him not seek't of us; By day and night, he's traitor to the height." (Act I, Scene II.)

In his attempt to prevent a ratification of the peace treaty closed by Coriolanus, with Rome, Aufidius tells the citizens: "*Auf.* Read it not, noble lords; But tell the traitor, in the highest degree, he hath abus'd your powers." (Act V, Scene V.)

Sec. 77. Quillets of the law.—

"*Long.* O, some authority how to proceed,
Some tricks, some quillets, how to cheat the devil."[1]

"Quillet," is no doubt derived from *quidlibet,* meaning what you please. A subtle, nice point of law, is referred to as a "quillet" and the term is used as a synonym for quibble.[2] The thought of the player is that the violation of the oath was without excuse and unless by some trick, or quibble, they could avoid it, the devil would be rewarded for their transgression. Of course a "quillet" or quibble[3] is generally a cavil raised without necessity and it may be doubted, from a professional standpoint, if any lawyer is justified in causing such questions, in an argument.

The king tells his wife, in Hamlet, in regard to Laertes threats:

"Let him go, Gertrude; do not fear our person;
There's such divinity doth hedge a king,
That treason can but peep to what it would,
Acts little of his will." (Act IV, Scene V.)

Referring to the pure Lucrece, and Tarquin's attack upon her chastity, the Poet said, in The Rape of Lucrece:

"The dove sleeps fast that this night-owl will catch:
Thus treason works, ere traitors be espied." (360, 361.)

[1] Love's Labour's Lost, Act IV, Scene III.

[2] Webster's Dictionary.

[3] Bouvier's Law Dictionary. Mr. Bouvier says: "No justly eminent member of the bar will resort to a quibble in his argument. It is contrary to his oath, which is to be true to the court, as well as to his client; and bad policy, because by resorting to it, he will lose his character as a man of probity."

Warwick, in replying to Somerset's request to judge between himself and Richard Plantagenet, in 1' Henry VI, said:

"*War.* . . I have, perhaps, some shallow spirit of judgment;
But in these nice, sharp quillets of the law,
Good faith, I am no wiser than a daw." (Act II, Scene IV.)

Suffolk thus urges the death of the good Gloster, in 2' Henry VI:

"*Suff.* . . And do not stand on quillets, how to slay him:
Be it by gins, by snares, by subtlety,
Sleeping or waking, 'tis no matter how,
So he be dead, for that is good deceit." (Act III, Scene I.)

Sec. 78. Statute-caps.—

"*Rosaline.* Well, better wits have worn plain statute-caps.
But will you hear? the king is my love sworn."[1]

During the reign of Queen Elizabeth, it was not infrequent that laws were passed ostensibly for the betterment of the general class of citizens but really favorable to some particular class. In the year 1571 an act of Parliament was passed in the interest of the trade of cappers, which required all citizens, other than the nobility, and those excepted, to wear woolen caps on Sundays and holidays, under the pain and penalties of the statute.[2]

As this law only required the citizens or common people to wear woolen caps, the meaning is plain, that better wits could be found among the plain people than the King and his followers.

Timon of Athens, said, "*Tim.* Crack the lawyer's voice, That he may never more false titles plead, Nor sound his quillets shrilly." (Act IV, Scene III.)

In Hamlet, when the Prince comes upon the grave diggers and he talks of the skull of the supposed lawyer, he speaks of "his quiddits, his quillets, his cases, his tenures, and his tricks." (Act V, Scene I.)

In the controversy with the Clown, in Othello, the Moor of Venice, Cassio is made to say: "Pr'ythee, keep up thy quillets." (Act III, Scene I.)

[1] Love's Labour's Lost, Act V, Scene II.

[2] V Reeve's History English Law, 238; Rolfe's Love's Labour's Lost, p. 205, notes.

Sec. 78a. Slander dependent upon hearer's attitude.—

"*Rosaline.* A jest's prosperity lies in the ear
Of him that hears it, never in the tongue
Of him that makes it."[1]

This philosophy of the Poet, in which he truthfully concludes that the success of a jest is dependent more upon its reception by the hearer than upon the delivery of the speaker, has been used by courts and lawyers in libel and slander cases, to illustrate the necessity of a willing ear to add prosperity to a slander. Of course the prosperity of a slander suit is almost wholly dependent upon the attitude of the hearer of the slander, because words that might be slanderous, *per se*, when spoken into the ear of one who does not apply them as charging the complainant with moral turpitude or wrong-doing, will not lead to a successful termination of the suit, unless actually re-told as uttered, or in such manner as to constitute a valid cause of action, at law, hence, the prosperity of a slander, like "a jest's prosperity, lies in the ear of him that hears it," and if it is not heard by one who repeats it in such manner as to charge some moral turpitude or wrong-doing to the one of whom the words were spoken, then the suit would fail, regardless of the words actually used by "the tongue of him that makes it."[2]

---

[1] Love's Labour's Lost, Act. V, Scene II.

[2] This application of these lines is made by Judge Lamm, of the Supreme Court of Missouri, in the recent case of Diener vs. Chronicle Publishing Co., 230 Mo. 629, wherein the court said:

"It was happily said by Goode, J., in a case on which I cannot put my finger, that in this aspect a libel or slander is like unto a jest, i. e., the prosperity of each lies in the ear of the hearer—thus hitching the gravity of the law to the car of the light philosophy of Rosaline:

"A jest's prosperity lies in the ear
Of him who hears it, never in the tongue
Of him that makes it."
—Love's Labour's Lost, Act V, Scene 2.

In other words, since a slander is an injury to a person's character and reputation caused by spoken words, the slander must always be communicated to a third person and the existence, or non-existence of the offense depends entirely upon the manner in which the words are repeated by the person to whom they were communicated.

It is difficult to define just what kinds of words are actionable, but, in general, whatever imputes disgraceful, fraudulent or dishonest conduct or tends to make one appear contemptible, in his private relations, or to be shunned by his friends or acquaintances, is a slander. Words imputing a crime or an indictable offense, or a contagious disease, are slanderous. Words, to be actionable in themselves, without proof of special damage, must impute, according to Heard, "the commission of a crime, involving moral turpitude, and which is punishable by law."

Words spoken of one in office, which cause the loss of the office, or which impute the want of ability or capacity in one's business, or attribute a disease to one, which renders him unfit for society, are actionable, without proof of special damage.

Unless the words are of this character, however, special damage must be proved, to furnish a valid cause of action; the words must not have been in the nature of a privileged communication and they must have been uttered without legal cause.

Epithets which cause no special damage, such as merely calling a man a swindler, a scoundrel, rogue, gambler or liar, are not actionable. But words imputing gross ignorance or misconduct affecting one's trade or profession are held to be actionable without proof of special damages, for to call a man a "bankrupt merchant," or a "quack doctor," or the like, is to injure him in his trade or profession, and such words furnish a cause of action.

CHAPTER IX.

"THE MERCHANT OF VENICE."

Sec. 79. Warranty.
80. Breach of Bond—Penalty for.
81. Sealing written instrument.
82. Extorting evidence upon the Rack.
82a. Tainted plea.
83. Usurer.
84. Plea of Forfeiture.
85. "The course of Law."
86. Bond.
87. Standing for Law.
88. Seal.
89. Moiety.
90. Charter.
91. The Issue before the Court.
92. Nature of Shylock's suit.
93. Portia's plea for Mercy.
94. Antonio's confession of the bond.
95. Plea for judgment.
96. Justice of Shylock's plea.
97. "I crave the Law."
98. Tender in open Court.
99. Effect of legal precedent.
100. Portia's judgment on the bond.
101. Commutation of punishment.
102. Conveyance in use.
103. Deed of gift.

Sec. 79. Warranty.—

"*Bass.* To you, Antonio, I owe the most, in money and in love;
And from your love I have a warranty,
To unburthen all my plots and purposes,
How to get clear of all the debts I owe."[1]

A "warranty," in real property, was a covenant, whereby the grantor of an estate of freehold was bound to war-

[1] Merchant of Venice, Act I, Scene I.

rant the title and either upon voucher or upon eviction, to yield lands of an equal value with those from which the tenant was evicted.[1] In the old practice, the warrantor was called into court, by the party warranted to defend the suit for him and the time for the voucher was after the demandant had counted.[2] The thought expressed by Bassanio is that the love of Antonio was to stand sponsor for all his debts or that by his love his debts were to be warranted.

Sec. 80. Breach of bond—penalty for.—

"*Ant.* If thou wilt lend this money, lend it not
As to thy friends (for when did friendship take
A breed for barren metal of his friend?)
But lend it rather to thine enemy;
Who, if he break, thou may'st with better face
Exact the penalty."[3]

It was remarked by Lord Bacon, in one of his Essays,[4] that people were wont to say that it was "against nature, for money to beget money"; Antonio expresses this same thought in his philosophy that friendship would not exact a breed "for barren metal." He asked no special favor or courtesy, but only that in case he failed to keep his bond, that the penalty be exacted.

A penalty is the undertaking to pay an additional sum of money or to submit to punishment of a certain kind, if there shall be a failure to fulfill the contract obligation.[5] The term is mostly applied to pecuniary punishment,[6] but may as well include the corporal punishment included in the obligation of this bond, in case of a breach of its condition.

---

[1] Coke, Litt. 365a.
[2] Coke, Litt. 101b.
[3] Merchant of Venice, Act I, Scene III.
[4] Civil & Moral Essay, No. 41.
[5] Bouvier's Law Dictionary.
[6] 8 Comyns Dig. 846.

Sec. 81. Sealing a written instrument.—

"*Shy.* Go with me to a notary; seal me there
Your single bond; and, in a merry sport,
If you repay me not on such a day,
In such a place, such sum, or sums, as are
Expressed in the condition, let the forfeit,
Be nominated for an equal pound
Of your fair flesh, to be cut off and taken
In what part of your body pleaseth me.
Ant. Content, in faith: I'll seal to such a bond,
And say, there is much kindness in the Jew, ...
Yes, Shylock, I will seal unto this bond."[1]

The distinction between a singular bond and a regular bond with principal and surety, in common form, is recognized by the Poet in Shylock's request for a "single bond," but in demanding the sealing of such bond, the English legal requisite to a valid specialty contract is likewise recognized. The novelty of making written instruments with seals of wax and other ceremonies, was introduced into England by the Normans.[2] Such instruments were originally brought into court; either the king's court, the court of the county, or into some assembly and there the act of making and acknowledging the instrument was performed.[3] When the instruments were not executed in this public manner, they were usually attested by men of character and prominence, or by officers of the king, notaries, or such like, or by the mayor, bailiff or some such civil officer.[4] The "condition" of a bond is that part which specifies the agree-

[1] Merchant of Venice, Act I, Scene III.

[2] I Reeve's History English Law, p. 336.

[3] In practice, a wafer or seal was attached to the end of the writing, and the party who executed it, after his signature put his finger on the seal and said: "I deliver this as my act and deed," at the same time handing the writing over. Mad Form. Biss. 26; 1 Reeves History Eng. Law, p. 337.

[4] I Reeve's History Eng. Law, 337.

ment between the parties and the sum to be paid, on the breach of the obligation, is called the forfeit.[1]

Shylock's invitation to go with him to the "notary," had reference to this legal ceremony of signing and sealing the bond, and Antonio's consent to "seal to such a bond" expresses, in common legal parlance, the familiarity of one used to such a ceremony, and his willingness to put the obligation in the legal form of a binding specialty contract.

---

[1] Bouvier's Law Dictionary.

A "single bond,"—*simplex obligatio*—is one in which the obligor binds himself, his heirs, etc., to pay a certain sum of money to another at a day named. (Bouvier's Law Dictionary.) It is properly to be distinguished from a conditional bond, in that the former does not contain the same form in law, as the latter, which is conditioned that if the obligor does some act, the bond is to be void. It is passing strange that the Poet, if unlearned in the deep science and technicalities of the law, should have noted, in this verse this legal distinction between these different kinds of bonds and made of this bond, the kind the transaction made essential, instead of the other kind, that one less informed in the law would perhaps have selected, or, more likely, would have specialized no particular kind of bond at all.

The substance and condition of this bond and the incidents of the forfeiture are related in the *Gesta Romanorum*, but there is little doubt, as stated by Hudson, but what the details and plot of the play were taken from the Italian novel by Giovanni Fiorentino, written in 1378, as the main points of this story are reproduced in the play, in a slightly transformed form. Bassanio corresponds to the hero in this novel, who had executed the bond to the Jew, and his intended bride, disguised as a doctor of law so construes the bond as to deny the Jew his pound of flesh, in substantially the same way in which the bond was construed by Portia. (See Introduction to Hudson's Merchant of Venice, pp. 50, 51.)

Glendower is quoted as saying, in 1' Henry IV:

"*Glen.* Come, come, lord Mortimer; you are as slow,
As hot lord Percy is on fire to go.
By this our book's drawn: we'll but seal, and then
To horse immediately." (Act III, Scene I.)

Sec. 82. Extorting evidence upon the rack.—

"*Por.* Ay, but I fear, you speak upon the rack,
Where men enforced do speak anything."[1]

Alluding to the old custom of sealing instruments with soft wax, Falstaff, in 2' Henry IV, refers to his meeting with Justice Shallow, as follows: "*Fal.* . . . I'll through Glostershire; and there will I visit master Robert Shallow, esquire; I have him already tempering between my finger and my thumb and shortly will I seal with him." (Act IV, Scene III.)

Pandarus tells Troilus and Cressida, after the details of their pre-contract of marriage, are agreed to: "*Pan.* Go to, a bargain made; seal it, seal it; I'll be the witness." (Act III, Scene II.)

The Senators tell Alcibiades, in urging clemency for the people of Athens, in Timon of Athens:

"2 *Sen.* . . all thy powers,
Shall make their harbour in our town, till we
Have seal'd thy full desire." (Act V, Scene V.,

Coriolanus tells the Citizens, on his return to the Volscians: "*Cor.* . . . And we here deliver, subscrib'd by the consuls and patricians, together with the seal o' the senate, what we have compounded on." (Act V, Scene V.)

Pompey tells Lepidus, in Antony and Cleopatra:

"*Pom.* I hope so, Lepidus.—Thus we are agreed:
I crave our composition may be written,
And seal'd between us." (Act II, Scene VI.)

Enobarbus tells Agrippa, in Antony and Cleopatra:

"*Eno.* They have despatched with Pompey, he is gone;
The other three are sealing." (Act III, Scene II.)

Antony, in his death, is made to refer to the legal formula of sealing, in the following lines:

"*Ant.* . . . Now, all labour
Mars what it does; yea, very force entangles
Itself with strength; Seal then, and all is done."
(Act IV, Scene XII.)

Helicanus, in Pericles, Prince of Tyre, speaks of the "Seal'd commission, left in trust," with him, on the commencement of his journey, by king Pericles. (Act I, Scene III.)

Simonides joins the hands of Pericles, Prince of Tyre, and his daughter Thasia, and tells them that their "hands and lips must seal it too." (Act II, Scene V.)

[1] Merchant of Venice, Act III, Scene II.

The rack was an engine with which to torture a supposed criminal to extort a confession of his crime from him, together with the names of his supposed accomplices.[1] It consisted of an oblong frame of wood, with four beams, raised from the ground, on which the witness was stretched and bound; cords were attached to his extremities, and they were gradually stretched by means of a lever and pulleys, until the evidence was forthcoming, or the limbs of the sufferer were dislocated. The rack was used in England in the fifteenth and sixteenth centuries and according to Lord Coke it was first introduced into the Tower by the duke of Exeter, constable of the Tower, in 1447, from whence it derived the name, "the duke of Exeter's daughter." It is mentioned by Holinshed, in 1467, and in the time of King Henry VIII, it became a common appliance for the torture of prisoners of the Tower. Punishment by the rack took place during the reign of the Tudor sovereigns, by warrant of the council, or under the sign-manual, but in 1628, on the murder of the duke of Buckingham, by Felton, when it was proposed in the privy council to put the assassin to the rack, to compel him to divulge his accomplices, the judges resisted the proceeding, because it was contrary to the English law. While it has never been used by the Americans, it was used by the French in Montreal, and is preserved as a relic of the French rule in that country.[2]

Of course, when subjected to such torture, the witness was liable to state whatever was desired to be disclosed by him, hence Portia's reference to the enforced statements of Bassanio.

---

[1] Bouvier's Law Dictionary.

[2] Taylor's Elem. Civil Law.

The wrists and ankles of the witness were fastened by cords attached to rollers at the end of the frame work, on which he was stretched. These rollers were then drawn in opposite directions, until the body of the victim was raised to a level with the

frame; if he refused to disclose what was asked him, or desired to be obtained, in response to the interrogatories submitted, the rollers were further moved until at last the bones were drawn from the sockets. (Americana.)

When pressed for an answer, Falstaff is made to say, in 1' Henry IV (Act II, Scene IV): "*Fal.* What, upon compulsion? No, were I at the strappado, or all the racks in the world, I would not tell you, on compulsion."

Edmund Mortimer, in 1' Henry VI, referring to his imprisonment, said: "*Mor.* . . Even like a man new haled from the rack, So fare my limbs with long imprisonment." (Act II, Scene V.)

With others, the Cardinal Beaufort, upbraided the good Duke of Gloster in 2' Henry VI, as follows: "*Car.* The commons hast thou rack'd; the clergy's bags are lank and lean with thy extortions." (Act I, Scene III.)

Referring to the fortitude of his tool, John Cade, the duke of York, in 2' Henry VI, said: "*York.* Say, he be taken, rack'd and tortured: I know no pain they can inflict upon him, will make him say—I mov'd him to those arms." (Act III, Scene I.)

Cressida and Pandarus, in the colloquy over Troilus, in Troilus and Cressida say: "*Pan.* I can't choose but laugh, to think how she tickled his chin;—Indeed, she has a marvelous white hand, I must needs confess.

Cres. Without the rack?" (Act I, Scene II.)

Paulina refers to torture by the rack, in Winter's Tale, when she asks Leontes: "*Paul.* What studied torments, tyrant, hast for me? What wheels? racks? fires? What flaying," etc. (Act III, Scene II.)

Antony tells Eros, in Antony and Cleopatra: "*Ant.* . . . That which is now a horse, even with a thought, The rack dislimns." (Act IV, Scene XII.)

Lear refers to the rack, when he replies to Albany as follows: "O most small fault, How ugly did'st thou, in Cordelia show: Which, like an engine wrenched my frame of nature, From the fix'd place." (Act I, Scene IV.)

On the death of Lear, the Earl of Kent is made to say:

"*Kent.* Vex not his ghost:—O, let him pass; he hates him,
That would upon the rack of this tough world
Stretch him out longer." (Act V, Scene III.)

Othello tells Iago, after he has thoroughly aroused his jealousy: "Avaunt: be gone: thou hast set me on the rack." (Act III, Scene III.)

Sec. 82a. Tainted plea.—

"*Bass.* In law, what plea so tainted and corrupt
But, being season'd with a gracious voice,
Obscures the show of evil? In religion,
What damned error, but some sober brow
Will bless it and approve it with a text,
Hiding the grossness with fair ornament?"[1]

In this casket scene, where Portia did all that she could, by means of the song, to advise Bassanio of the selection to make, without violating her express promise, in soliloquizing upon the hollowness of outward show and ostentation and the prevalency with which the world was deceived with ornaments, so prone was the poet to indulge in legal references and illustrations, that the popular conceit of the time, that the legal profession, when retained upon the side of an evil cause, used even the guile of a gracious voice, as an arrow for the heart, in order to obscure the "show of evil," found expression in this fling at the lawyers of that day.

While a popular notion, that a "tainted and corrupt" plea, at law, was obscured or covered up, by a "gracious voice," the fact that the court or jury also heard the other side, no doubt made it as difficult in that time as it is in this for an "evil cause" to run the gauntlet of the courts. The pit, then as now, no doubt applauded this reference of the lover to the popular conceit, at the expense of lawyers, but those who have spoken in the interest of a "tainted plea," in court, even with the devil's choicest quiver, aim'd directly at the heart of an austere judge, with however gracious, soft, or even tremulous voice, have, perhaps, experienced how wide of the mark these well selected arrows fly and how seldom, in reality,

[1] Merchant of Venice, Act III, Scene II.

a tainted plea or an evil cause prevails, where correct judicial standards are applied.[2]

The courts are organized to enforce the right and to redress the wrong. A tainted plea, being urged in the furtherance of a wrong, it is the very business and object of the court to prevent the same and hence, it is the rule that the court, itself, stands as an insurmountable obstacle to the attainment of a "tainted plea," however much it may "obscure the show of evil."

Indeed, the poet seemed to realize that while "a gracious voice," "in law," might more or less obscure the "show of evil," it was the exception and not the rule, for such a plea to run the gauntlet of the court, for by way of drawing a parallel to such a plea, in law, he uses the rare exception, in religion, where "some sober brow," "will bless" and approve, with a text, the "damned error," that owes its origin to the Devil alone and which is foreign to the beneficent object of religion.

At first reading, this verse, therefore, would seem to reflect upon the courts. The poet stops short of concluding that the "tainted plea" can be successfully urged, by means of a "gracious voice," but only observes that the "show of evil" therein, may be obscured thereby. And in likening the fallacy of advocating, in law, the tainted plea, he draws the parallel of the religious text, based upon "damned error," which "*some* sober brow" will bless and approve, with a text.

It is, of course, not the rule, in religion, to speak in furtherance of "damned error," any more than it is, in law, to urge a "tainted plea." There are churchmen and lawyers, who sometimes do these things, but fortunately it is only "some" of the "sober brows" in religion, who approve false texts, just as it is in law, the rare exception that a "tainted plea," although obscured by a gracious voice, can prevail, in a court of justice.

[2] This quotation is referred to, by Judge Henry Lamm, the literary member of the Supreme Court of Missouri, in his usual instructive manner, in the case of Cook vs. Newby, 213 Mo. 493.

Sec. 83. Usurer.—

"*Shy.* . . . Let him look, to his bond: he was wont to call me usurer;—let him look to his bond: he was wont to lend money for a Christian courtesy;—let him look to his bond."[1]

Shylock's expressed animosity toward Antonio, because he was "wont to call me usurer," is in strict accordance with the history of the subject of usury, in England. The first usurers, in England, were the Jews.[2] During the Crusades, when everything but military glory and religious zeal, was neglected by the Britons, the Jews, who had come from Normandy, after the Conquest, became the chief money lenders in England.[3] On account of their rapacity, the Jewish money lenders were banished from England, near the close of the thirteenth century.[4] The church then attempted the handling of usurers, punishing them, "for the good of their souls," by censures and excommunications,[5] and from the fifteenth until the middle of the nineteenth century, in England, the subject of usury was a fruitful source of legislation.[6] The injunction of Moses, against the exaction of usury,[7] which

---

In the XXXIII' Sonnet, it is said:

"Anon permit the basest clouds to ride
With ugly rack on his celestial face,
And from the forlorn world his visage hide,
Stealing unseen to west with this disgrace." (5, 8.)

The rack is referred to in the CXXVI' Sonnet, in these lines:

"If Nature, sovereign mistress over wrack,
As thou goest onwards, still will pluck thee back,
She keeps thee to this purpose, that her skill
May time disgrace and wretched minutes kill." (5, 8.)

[1] Merchant of Venice, Act III, Scene I.
[2] Webb, Usury, Sec. 9.
[3] Kelly, on Usury, p. 17.
[4] Epist. Paul Bleseus, 156, p. 242.
[5] Roll. Abr. Tit. Usurers.
[6] Webb, Usury, p. 8.
[7] Lev. XXV., 35-37; Deut. XXIII., 19-20.

the Christian would naturally follow, is no doubt intended in the reference, by Shylock, to the loaning of money as a "Christian courtesy," but the Jew could claim the benefit of the dispensation of the Mosaic law, as it permitted such transactions with strangers.[1]

---

[1] *Ante idem.* Plow. 85; Fleta, lib. 2, c. 27.

The Romans and Athenians attempted at divers times, the regulation of usury, without giving satisfaction to the people (IV Gibbon, Rome 368); the policy of maintaining some restrictions upon money lenders is still prevalent, but usury is not now regarded with the same feeling that all who practice it are iniquitous, as they were formerly regarded. Webb, Usury, p. 13.

Speaking of the prejudice against usurers, in both ancient and modern times, Lord Bacon, in his Essay (Civil and Moral, No. 41) said: "Many have made witty invectives against usury. They say it is the pity the Devil should have God's part, which is the tithe; that the usurer is the greatest Sabbath breaker, because his plow goeth every Sunday; . . that the usurers breaketh the first law, that was made for mankind, after the fall, which was, *in sudore vultus tui comedes panem tuum;* that it is against nature for money to beget money and the like. . . . Few have spoken of usury usefully."

But comparing money lenders with others whose cupidity for getting rich, is not materially different, Judge Lumkin, for the Georgia Supreme Court said: "They may be as inexorable as Shylock and the more selfish and callous, from the fact that they earn their living by dealing indirectly in money, the love of which is the root of all evil. But observation has convinced me that all who will be rich, whether usurers or land-jobbers, or speculators of any other class, . . fall, not only into divers temptations and snares, but soon become almost, if not altogether, regardless of the means by which they seek to attain their end."

Gloster tells the Bishop of Winchester, in 1' Henry VI: "*Glo.* . . Thou art a most pernicious usurer." (Act III, Scene I.)

Apemantus, the philosopher, in Timon of Athens, said: "*Apem.* Poor rogues and usurer's men: bawds between gold and want." (Act II, Scene II.)

And the fool said: "*Fool.* I think, no usurer but has a fool

Sec. 84. Plea of forfeiture.—

"*Sale.* Never did I know a creature,
That did bear the shape of man,
So keen and greedy to confound a man:
He plies the duke at morning and at night;
And doth impeach the freedom of the state,
If they deny him justice: twenty merchants,
The duke himself, and the magnificoes,
Of greatest port, have all persuaded with him;
But none can drive him from the envious plea
Of forfeiture, of justice, and his bond."[1]

Forfeitures have always been regarded with odium by the courts.[2] This fact was evidently known and appreciated by the Poet, for in this verse, he presents the most hideous plea for a forfeiture that could well be conceived, of a hated Jew, urging a forfeiture against a gentle and lovable person, in such manner as to encompass his life.

---

to his servant: My mistress is one and I am her fool." (Act II, Scene II.)

Alcibiades tells the Senate, on refusal of his plea for the life of his soldier client, in Timon of Athens: "*Alcib.* Banish me? Banish your dotage; banish usury, that makes the Senate ugly." (Act III, Scene V.)

Timon of Athens, in the forest tells Alcibiades: "*Tim.* Pity not honour'd age, for his white beard, He's an usurer." (Act IV, Scene III.)

A citizen, in Coriolanus, said: "1 *Cit.* . . Suffer us to famish, and their store-houses crammed with grain; make edicts for usury, to support usurers." (Act I, Scene I.)

In the sixth Sonnet, in urging the natural use of beauty, the Poet thus refers to usury:

"That use is not forbidden usury,
Which happies those that pay the willing loan."

The incarceration of Southampton, is compared to the exaction of usury for the debt due by the Poet, in the CXXXIV Sonnet:

"The statute of thy beauty thou wilt take,
Thou usurer, that put'st forth all to use,
And sue a friend came debtor for my sake." (9, 11.)

[1] Merchant of Venice, Act III, Scene II.

[2] 4 Kent's Comm. 81, 82, 424.

And this, in such greedy and importunate manner as that delineated, so that none could drive him from "the envious plea of forfeiture," which he sought in the name of "justice and his bond." The injustice of such a plea could not well be presented in an abler manner than is done in this verse.

A forfeiture of a bond is the failure to perform the condition upon which the obligee was to be excused from the penalty in the bond.[1] The word forfeiture includes not merely the idea of losing the penalty, but also of having the property right transferred to the other party, without the consent of the party who has violated his obligation. Where the enforcement of a forfeiture was unjust, courts of equity always granted relief therefrom,[2] and courts of law finally came to assume a like jurisdiction.[3]

Sec. 85. "The course of law."—

"*Ant.* The duke cannot deny the course of law.
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state."[4]

---

[1] Bouvier's Law Dictionary.

[2] Coke, Litt. 209a; 2 Bl. Comm. 340.

[3] *Ante idem.*

The relief furnished by Antonio, against the forfeitures sought by the Jew, against other debtors, is mentioned as the basis for his dislike, by Antonio, in these words:

"*Ant.* . . . He seeks my life; his reason well I know;
I oft delivered from his forfeitures,
Many that have at times made moan to me;
Therefore he hates me."

Salan. I am sure, the duke will never grant this forfeiture to hold." (Merchant of Venice, Act III, Scene III.)

Varro's Servant, on referring to the past due bonds of his master, he presented to Timon, in Timon of Athens, said: "*Var. Serv.* 'Twas due on forfeiture, my lord, six weeks." (Act II, Scene II.)

[4] Merchant of Venice, Act III, Scene III.

This is a beautiful and touching tribute paid by the Poet to the majesty of the law, which was recognized as beyond and above the power of royalty. That the denial of the affirmative rights of any citizen would "much impeach the justice of the state" by denying, from analogy, the property rights of the strangers in the city, by the like denial of "the course of law," is an observation in keeping with the whole philosophy of the law and the danger of breaking down the precedents or the regular course of legal proceedings is plainly set forth in this verse.

Macbeth exclaims: "This even-handed justice commends the ingredients of our poison'd chalice to our own lips." (Macbeth, Act I, Scene VII.)

The lofty idea here expressed is that involved in the appeal to the ideal feeling, which defends the law, because it is the law and not on account of any personal interest. This is the ideal height of the struggle for law, when the motive of personal interest is subordinated for that of the moral preservation of the state, by co-operation for the realization of the idea of law. Von Ihering's Struggle for Law, p. 73.

The Chief Justice explains to Henry V, why the laws must be impartially enforced, in 2' Henry IV, as follows:

"*Ch. Jus.* . . Be you contented, wearing now the garland,
To have a son set your decrees at nought;
To pluck down justice from your awful bench;
To trip the course of law, and blunt the sword,
That guards the peace and safety of your person."
(Act V, Scene II.)

After the Justice's explanation of the necessity of enforcing the law against all alike, Henry V, said to him, in 2' Henry IV: "*King.* You did commit me: For which, I do commit into your hand, the unstained sword that you have used to bear; with this remembrance,—that you use the same with the like bold, just and impartial spirit, as you have done 'gainst me." (Act V, Scene II.)

In referring to his previous contempt of court, the Chief Justice tells the former Prince of Wales, in 2' Henry IV: "*Ch. Jus.* Your highness pleased to forget my place; The majesty and power of law and justice, The image of the king, whom I presented, And struck me in my very seat of judgment." (Act V, Scene II.)

Sec. 86. Bond.—

"*Shy.* I'll have my bond; I will not hear thee speak:
I'll have my bond; and therefore speak no more.
I'll not be made a soft and dull-ey'd fool,
To shake the head, relent, and sigh and yield
To Christian intercessors. Follow not;
I'll have no speaking; I will have my bond."[1]

This repeated declaration of intention, on Shylock's part, to have nothing but his "bond," heightens the interest in the final trial scene, since it is but natural anxiety, to wait and see if the judgment in the trial scene will enforce or reject this inhuman demand, guaranteed by the solemn written contract. The repetition also emphasizes the nature of the right guaranteed him, by his written contract, in the shape of a solemn bond.

A "bond" is an obligation in writing and under seal.[2] Formerly, on the forfeiture of a bond, the whole penalty was recoverable at law, but in courts of equity—where forfeitures were relieved against—on breach of an obligation for payment of money only, the court would compel an acceptance of the original sum, with interest and deny the penalty, and, finally, on this practice becoming general in courts of law, as well, a statute was enacted, in England,[3] providing that a tender of principal and interest with accrued costs, would operate as a full satisfaction of a bond.[4]

Buckingham tells Gloster, in 2' Henry VI: "*Buck.* Thy cruelty in execution upon offenders, hath exceeded law, and left thee to the mercy of the law." (Act I, Scene III.)

Speaking of the death of the good Gloster, Cardinal Beaufort said, in 2' Henry VI: "*Car.* . . . But yet we want a colour for his death, 'Tis meet he be condemn'd by course of law." (Act III, Scene I.)

[1] Merchant of Venice, Act III, Scene III.
[2] Bouvier's Law Dictionary.
[3] 4 & 5 Anne, c. 16.
[4] 2 Bl. Comm. 340.

Mr. Davis, in his commentaries on the "Law in Shakespeare"

Sec. 87. Standing for law.

"*Shy.* Repair thy wit, good youth, or it will fall
To cureless ruin.—I stand here for law."[1]

In keeping with the whole course of Shylock's conduct, before and during the trial of the issue of the legality of

observes that the Poet might very properly have invoked the chancery process of injunction to relieve against the enforcement of this penalty of the bond, as this procedure was then recognized by the English Court of Chancery, but of course if this were true—which the history of the Chancery Court establishes—an English Court would have had no jurisdiction of an action in a Venetian State, so this observation would not have furnished the Poet with a much better remedy than the subterfuge he adopted to let Antonio escape from the obligation of his bond.

Shylock's plea for his bond, is further set out in this play, as follows: "*Shy.* If every ducat in six thousand ducats, were in six parts, and every part a ducat, I would not draw them; I would have my bond." (Merchant of Venice, Act IV, Scene I.)

And again, he said: "Proceed to judgment: by my soul, I swear, There is no power in the tongue of man, to alter me: I stay here on my bond." (Act IV, Scene I.)

Dromio said to his master, in Comedy of Errors: "*Dro.* Master, I am here entered in bond for you." (Act IV, Scene IV.)

Angelo, tells the Merchant, in Comedy of Errors: "*Ang.* . . Pleaseth you walk with me down to his house, I will discharge my bond and thank you, too." (Act IV, Scene I.)

In King Richard II, the following occurs between the Duke of York and the Duchess:

"*Duch.* What should you fear?
'Tis nothing but some bond that he has enter'd into
For gay apparel, 'gainst the triumph day.
York. Bound to himself? What doth he with a bond
That he is bound to? Wife, thou art a fool.—
Boy, let me see the writing." (Act V, Scene II.)

The Senator tells Caphis, in Timon of Athens: "*Sen.* Take the bonds along with you and have the dates in compt." (Act II, Scene I.)

And on presentation of the bonds, Timon said: "*Tim.* How goes the world that I am thus encountered with clamorous demands of date broke bonds." (Act II, Scene II.)

[1] Merchant of Venice, Act IV, Scene I.

his bond, this declaration of his intention to "stand for law," shows the basic faith in the majesty of law, which ought to have had a better reward, according to the standard erected by the judge who first recognized his claim, then set at naught this recognized legal right.

Placing his faith in the law alone, he withstood the taunts of those who scorned him, without swerving from his purpose to enforce his rights, through the medium of the law alone. While seeking an unrighteous purpose, he was willing to conform his actions and his will to the law, relying upon the constant and perpetual will, on the part of those administering the law, to render unto every man his due.[1] In other words, he stood "for law," and regardless of his illusion, as to the justness of his cause, his attitude can but commend his action, to those who appreciate the majesty of the law.

Sec. 88. Seal.—

"*Shy.* Till thou can'st rail the seal from off my bond,
Thou but offend'st thy lungs to speak so loud."[2]

In these lines Shylock expressed the preference that his debt held, under the English law, because of the seal attached, over debts not so evidenced. A bond or other

[1] This is really justice, nothing more nor less. Justinian, Inst. b. 1, tit. 1; Coke, 2' Inst. 56; Touillier, Droit, Civ. Fr. tit. prel. n. 5.

Falstaff makes the following reference to the law, in a colloquy with Prince Henry: "*Fal.* . . . pr'ythee, sweet wag, shall there be gallows standing in England when thou art king? and resolution, thus fobbed as it is, with the rusty curb of old father antic the law?" (1' Henry IV, Act I, Scene II.)

In refusing the plea of Alcibiades for his client, in Timon of Athens, the Senator tells him: "1 *Sen.* We are for law, he dies; urge it no more, on height of our displeasure: Friend or brother, he forfeits his own blood, that spills another." (Act III, Scene V.)

Timon of Athens, tell the thieves who come to him, in the forest: "*Tim.* The laws, your curb and whip, in their rough power, Have uncheck'd theft." (Act IV, Scene III.)

[2] Merchant of Venice, Act IV, Scene I.

writing, under seal, was called a specialty contract, to distinguish it from other writings or contracts, not bearing a seal.[1] A specialty debt, such as a bond under seal, in the event of the debtor's death, prior to 1870, when such preference was abolished, had the right of prior payment over simple contract debts.[2] The Anglo-Saxons affixed the cross, but the Normans introduced the custom of sealing all specialty contracts with seals of wax and the execution of written instruments after the conquest was accompanied with various circumstances of solemnity, such as sealing, dating, attesting and otherwise evidencing the execution of the instrument by the parties thereto.[3] These seals of wax were of various colors and were generally round or oval and were affixed to a label on the parchment or to a silk string fastened to a fold at the bottom of the writing or to a slip of the parchment, cut from the writing and made pendulous to impart greater character to the document.[4] The distinction, while obtaining, in the Poet's time, in law, between sealed and unsealed instruments, has been largely, by statute, abolished in England at the present day,[5] as well as in the United States.[6]

---

[1] Lawson, on Contracts (2nd Ed.).

[2] *Ante Idem.* Bishop, Contracts; Beach, Mod. Law Contracts.

[3] I Reeve's History Eng. Law, p. 337.

[4] Mad. Form. Diss. 26; I Reeve's History Eng. Law, 337.

[5] Lawson, Contracts, *supra.*

[6] *Ante idem.*

In King John, the Arch Duke of Austria said to Arthur: "Upon thy cheek lay I this zealous kiss, As seal to this indenture of my love." (Act II, Scene I.)

King John is made to say, replying to Hubert: "*Hub.* Here is your hand and seal for what I did.

K. John. O, when the last account 'twixt heaven and earth
Is to be made, then shall this hand and seal
Witness against us to damnation." (Act IV, Scene II.)

In King Richard II, the Duke of York said to his son:

"*York.* What seal is that, that hangs without thy bosom?
Yea, look'st thou pale? let me see the writing."
(Act V, Scene II.)

Sec. 89. Moiety.—

"*Duke.* Make room, and let him stand before our face.—
Shylock, the world thinks, and I think so too,
That thou but lead'st this fashion of thy malice
To the last hour of act; and then, 'tis thought,
Thou'lt show thy mercy and remorse, more strange,
Than is thy strange apparent cruelty:
And where thou now exact'st the penalty
(Which is a pound of this poor merchant's flesh,)
Thou wilt not only lose the forfeiture,
But touched with human gentleness and love,
Forgive a moiety of the principal."[1]

This appeal for mercy, whereby the Duke appeals to Shylock to forego the penalty of his bond and accept the money, or forego a "moiety of the principal" is in keeping with the whole scope of the Poet's treatment of this trial. Instead of regarding the contract as void, because of its illegality, to obtain the better effect and reach the climax of the judgment scene, the Poet treats the bond as legal and the penalty as collectible. This better shows the true character of the Jew, whose rights are trampled under foot for the dramatic effect of the trial scene, after being judicially recognized by the Court, by the subterfuge on Portia's part.

And Cade says, in 2' Henry VI: "*Cade.* . . Is not this a lamentable thing, that of the skin of an innocent lamb, should be made parchment? that parchment, being scribbled o'er, should undo a man? Some say, the bee stings: but I say, 'tis the bee's-wax, for I did but seal once to a thing and I was never my own man since." (Act IV, Scene II.)

The wicked Queen Margaret takes her farewell from Suffolk, in 2' Henry VI, as follows:

"*Q. Mar.* . . O, could this kiss be printed in thy hand,
That thou might'st think upon these by the seal."
(Act III, Scene II.)

Coriolanus tells the Citizens, from whom he seeks support: "*Cor.* I will not seal your knowledge, with showing them. I will make much of your voices and so trouble you no further."
(Act II, Scene III.)

[1] Merchant of Venice, Act IV, Scene I.

"Moiety," in law, is the half of any thing, as where a testator bequeathes one "moiety" of his estate to one person and another to another, each will take a half thereof.[1] The "principal" of this obligation, was, of course, the sum originally loaned, less the interest or damages, due because of the breach.[2] These terms are purely legal in their scope and illustrate the familiarity of the Poet with the lexicon of the law.

---

[1] Littleton, 125.

[2] Bouvier's Law Dictionary.

In All's Well That Ends Well (Act III, Scene II), the Countess said to Helena:

"*Count.* I pr'ythee, lady, have a better cheer;
If thou engrossest, all the griefs are thine,
Thou robb'st me of a moiety."

Leontes, in Winter's Tale, said: "Given to the fire, a moiety of my rest, might come to me again." (Act II, Scene III.)

And Hermione, the good queen, said: "A fellow of the royal bed, which owe, a moiety of the throne, a great king's daughter." (Winter's Tale, Act III, Scene II.)

And, in the same play, Autolycus said to the Shepard: "Well, give me the moiety:—are you a party in this business." (Act IV, Scene III.)

Speaking of the unequal division of his part of the country to be conquered, Hotspur is made to say, to Glendower and Mortimer, in 1' Henry IV: "*Hot.* Methinks, my moiety, north from Burton here, in quantity equals not one of yours." (Act III, Scene I.)

Henry V, in wooing Katharine of France, said: "*K. Hen.* . . do but now promise Kate, you will endeavor for your French part of such a boy; and, for my English moiety, take the word of a king and bachelor." (Act V, Scene II.)

Richard soliloquizes, in King Richard III: "*Glo.* On me, whose all not equals Edward's moiety? On me, that halt, and am misshapen thus?" (Act I, Scene II.)

The Duchess of York, on learning of Clarence's death, said to her daughter-in-law, Queen Elizabeth, in Richard III: "*Duch.* . . O, what cause have I (Thine being but a moiety of my grief), To over-go thy plaints, and drown thy cries." (Act II, Scene II.)

Replying to the suit of Queen Katherine, in King Henry VIII,

Sec. 90. Charter.—

"*Shy.* I have possess'd your grace of what I purpose;
And by our holy Sabbath have I sworn,
To have the due and forfeit of my bond.
If you deny it, let the danger light
Upon your charter and your city's freedom."[1]

Shylock here proclaims to the Duke that if his contract is not to be enforced, the provision of the organic law of Venice which guaranteed the inviolability of contract obligations, would be violated. The challenge is to the effect that the very Charter of the city would be threatened by such holding. A charter is a grant made by the sovereign, either to the whole people, or to a portion of them, securing to them the enjoyment of certain rights.[2] A notable illustration of such an instrument, in English history, was Magna Charta, the great repository of English liberties.[3] A charter differs from a constitution, in that the former is granted by the sovereign, while the latter is established by the people themselves, but both are regarded as the fundamental or organic law of the section where they apply.[4]

---

before the king became enamored with Anne Boleyn, he said to her: "*K. Hen.* . . . you have half our power; the other moiety, ere you ask, is given." (Act I, Scene II.)

Cæsar thus refers to Antony's death, in Antony and Cleopatra: "*Caes.* The death of Antony is not a single doom; in the name lay a moiety of the world." (Act V, Scene I.)

In Cymbeline, Iachimo said to Posthumus, in making the wager: "*Iach.* . . I dare, thereon, pawn the moiety of my estate to your ring." (Act I, Scene V.)

In King Lear, Gloster, is made to say: ". . For equalities are so weighed, that curiosity in neither, can make choice of either's moiety." (Act I, Scene I.)

[1] Merchant of Venice, Act IV, Scene I.

[2] 1 Bl. Comm. 108; 1 Story, Con. Sec. 161.

[3] Two of the original drafts of Magna Charta are preserved in the British Museum.

[4] Coke, Litt. 6; Dane, Abr. Charter.

Sec. 91. The issue before the court.—

"*Duke.* Are you acquainted with the difference
That holds this present question in the court?
Por. I am informed thoroughly of the cause."[1]

The Duke here enquired as to the Court's familiarity with the issue to be decided and Portia's reply shows that the Poet had in mind the necessity of a familiarity with the facts in issue, concerning which the judgment of the law, upon those facts, was sought. It is a rare thing that even an extra judicial opinion as to the construction of a written instrument can be offered, without having the contract to be construed before the interpreter thereof,[2] but in the whole scope of this trial, it does not appear that the Court really scanned the original of this bond, which

---

Jaques, in As You Like It, declares to the Duke: "I must have liberty, withal, as large a charter as the wind, to blow on whom I please." (Act II, Scene VII.)

King Richard II is made to say, in speaking of his willingness to grant blank charters for money to carry on his wars. (Act I, Scene IV):

"*K. Rich.* . . . . We are forc'd to farm our royal realm;
The revenue whereof shall furnish us
For our affairs in hand: If that come short,
Our substitutes at home shall have blank charters."

Stirring the citizens against Coriolanus, Brutus said: "*Bru.* He was your enemy; ever spake against your liberties, and the charters that you bear, i'the body of the weal." (Act II, Scene III.)

In the 58' Sonnet, to Southampton, the Poet said:
"Be where you list, your charter is so strong
That you yourself may privilege your time
To what you will." (9, 11.)

Charter is referred to in the LXXXVII' Sonnet in these lines:
"The charter of thy worth gives thee releasing;
My bonds in thee are all determinate." (3, 4.)

[1] Merchant of Venice, Act IV, Scene I.

[2] For the rules respecting the interpretation and construction of written instruments, see, 1 Bl. Comm. 59; 2 Kent's Comm. 522; Parsons, Cont. 3.

Antonio confessed. This is mentioned only to show that the conduct of the cause was more according to a special code of practice invented by the Poet, than by way of strict adherence to the practice in a court of justice.

Sec. 92. Nature of Shylock's suit.—

"*Por.* Of a strange nature is the suit you follow;
Yet in such rule, that the Venetian law
Cannot impugn you, as you do proceed."[1]

The observation of the Court that the suit was of a "strange nature" is clearly indisputable, but the other conclusion that "the Venetian law cannot impugn you, as you do proceed," is at variance with the later conclusion of the Court itself, who adjudges that the very object of the suit was counter to the law of Venice and of such a criminal nature as to make forfeit the life of Shylock and his estate confiscate unto the Crown. In view of this later conclusion, the statement here made that the law cannot impugn him, in the progress of such an unrighteous cause, is at variance with all rules of jurisprudence. All contracts having for their object the taking of human life have always been regarded as void, because contrary to good morals.[2] Nor could it be insisted that this proceeding would have been legal, according to the Twelve Tables of the Romans, for the procedure is at variance with the authorized process for the punishment of the debtor, according to the Twelve Tables, as history reproduces them.[3]

---

[1] Merchant of Venice, Act IV, Scene I.

[2] Lawson, Contracts (2nd Ed.) 343, and citations.

[3] By the 3' Table, the debtor had until thirty days *after* judgment to pay his debt and if he did not then pay or give security, or sell himself, by entering into the *nexum*, his creditor could seize him, load him with chains and treat him as a slave. Then after sixty days more, if he failed to pay, he was brought into the market place and either put to death or sold as a slave into Etruria. It was only where there were several creditors that he might, at their election, be divided and his body partitioned between them. Gibbon, vol. VII, p. 92; Gravina, De Jura Nat.

Portia claims to be able to show a special statute or decree holding the object of this bond to be a crime and if this were true the same statute would, by necessary implication, make void the bond, given to evidence such criminal act as the contract contemplated.[1]

Sec. 93. Portia's plea for mercy.—

"*Por.* The quality of mercy is not strain'd;
It droppeth, as the gentle rain from heaven
Upon the place beneath: it is twice bless'd;
It blesseth him that gives and him that takes:
'Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown:
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this scepter'd sway;
It is enthroned in the hearts of kings;
It is an attribute to God himself;
And earthly power doth then show likest God's,
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this,—
That, in the course of justice, none of us
Should see salvation: we do pray for mercy:
And that same prayer doth teach us all to render
The deeds of mercy."[2]

This plea for mercy is so beautiful that any comment thereon seems almost sacrilege. That "earthly power" shows "likest God's, when mercy seasons justice," is an apt comparison of the institutions of man with the Christian idea for the remission of the sins of the guilty, who confess and seek forgiveness. Mercy, in the legal acceptation of the term, is the total or partial remission of the

---

Gent. etc., Sec. 72; Niebuhr, Hist. Rome, vol. 2, p. 597. And eminent historians contend that this law only related to the division of the debtor's property, not his person, at all. Montesquieu, Esprit des Lois, b. 29, c. 2; Bynkershoek, Observ. Jur. Rom. lib. 1, c. 1; Heinneccius, Antiq. Rom. lib. 111, tit. 30, sec. 4.

[1] Lawson, Contracts, *supra*.

[2] Merchant of Venice, Act IV, Scene I.

punishment to which a person guilty of some offense is subject under the law.[1] In seeking mercy, before the adjudication of the punishment against Antonio, or before the mandate or judgment of the court, the Poet recognized the distinction in law, between mercy or clemency and pardon, for a pardon is the remission of punishment, after the judgment of the court, while clemency or mercy is extended before sentence.[2]

Sec. 94. Antonio's confession of the bond.—

"*Por.* Do you confess the bond?
Ant. I do."[3]

This course, on Portia's part, was consistent with the practice frequently resorted to, in order to save the time and formality of resorting to proof, of admitting certain facts, which are not disputed, without calling for the proof thereof. The admission was drawn forth, in the orderly manner, in the progress of the cause, for until the interest of the parties appeared, an admission would not have been availing, as the interest must appear in all cases at the time of making an admission.[4] After the interest of the parties appeared, however, then the admission here elicited had the force and effect of a regular judicial admission, which would be conclusive evidence against the party making it.[5]

---

[1] Jacob, Law Dictionary.

[2] Bouvier's Law Dictionary; Rutherforth, Inst. 224; 3 Story, Con., Sec. 1488.

In passing upon Alcibiades' defense of the felon, in Timon of Athens, the Senators hold this conference: "1 *Sen.* Nothing emboldens sin so much as mercy.

2 *Sen.* Most true; the law shall bruise him." (Act III, Scene V.)

[3] Merchant of Venice, Act IV, Scene I.

[4] 2 Stark. 41.

[5] 1 Greenl. Evid. Sec. 205; 2 Campb. 341.

Sec. 95. Plea for judgment.—

"*Shy.* . . . The pound of flesh, which I demand of him,
Is dearly bought, is mine, and I will have it:
If you deny me, fie upon your law.
There is no force in the decrees of Venice:
I stand for judgment: answer; shall I have it?"[1]

Shylock's plea for judgment, based upon the admission or confession of the execution of his bond, was properly urged, from a legal standpoint—if the legality of his bond were admitted—since the judgment or conclusion of the law, upon the facts found, or admitted, follows naturally, in the orderly course of legal proceedings, upon the fact of such admission.[2] The form of judgment to which a legal bond, or other written obligation for the payment of money would entitle one to recover, would be what is known as a judgment *quod recuperet,* that is, a judgment in favor of the plaintiff that he do recover, rendered whenever he has prevailed upon an issue of fact, duly established, or admitted by the opposing party to the cause.[3] A judgment on confession is called a judgment *cognovit actionem,* and such judgment is properly rendered whenever the defendant, instead of contesting the right of recovery, confesses the plaintiff's action.[4] But, of course, on grounds of public policy, a judgment would not be rendered in a court of justice, which has for its object, the taking of a human life, according to civil contract, for the concern of the state for the lives of its citizens would prevent the enforcement of such a judgment and the contract would be held to be illegal because of its being in contravention of good morals.[5]

---

[1] Merchant of Venice, Act IV, Scene I.

[2] Tidd Prac. 930.

[3] Stephen, Pl. 126.

[4] Freeman on Judgments.

[5] Chitty, Com. Law, 215, 217, 228, 250.

Commenting upon Shylock's attitude, as presented in this verse, as that of the seeker after justice in all climes and under all

Sec. 96. Justice of Shylock's plea.—

"*Por.* . . . I have spoke thus much
To mitigate the justice of thy plea;
Which, if thou follow, this strict court of Venice,
Must needs give sentence 'gainst the merchant there."[1]

This recognition of the legality of the bond, as the only alternative of the court, if the condition of the bond was insisted upon, is no doubt followed, because of the dramatic effect produced and the anxiety created as to the ultimate issue of the cause, after due recognition of the rights of the Jew, by the Court. Of course, as shown by Von Ihering,[2] the recognition of the legality of the bond, in the first instance, by the Court, was, from a strictly legal standpoint, all wrong, as the fact that it had for its object the taking of human life, or the serious maiming of a human being, made its object so far counter to good morals and against public policy, as to have justified the Court in holding that it was absolutely void; but as this would not have had the dramatic effect of holding the interest and creating the same anxiety in the final outcome of the trial, as the course pursued by the Poet, it is doubtless true that from a poetic standpoint the sacrifice of real justice and strictly legal rules, for the more striking system of jurisprudence adopted, was justified, in order to subserve the object had in view.

---

conditions, Dr. Von Ihering, observed: "It is hatred and revenge that take Shylock before the court to cut his pound of flesh out of Antonio's body; but the words which the Poet puts into his mouth are as true in it as in any other. It is the language which the wounded feeling of legal right will speak at all times and in all places; the power, the firmness of the conviction that law must remain law, the lofty feeling and pathos of the man who is conscious that, in what he claims, there is question, not only of his person, but of the law." Von Ihering's Struggle for Law, p. 80.

[1] Merchant of Venice, Act IV, Scene I.

[2] Von Ihering's Struggle for Law, p. 81.

Sec. 97. "I crave the law."—

"*Shy.* My deed's upon my head; I crave the law,
The penalty and forfeit of my bond."[1]

Commenting on the tragic expression, as one who deeply felt his wounded legal right, Von Ihering remarks of this phrase: "In these four words the Poet has described the relation of law, in the subjective, to law in the objective sense of the term and the meaning of the struggle for law in a manner better than any philosopher of the law could have done it. These four words change Shylock's claim into a question of the law of Venice. To what mighty, giant dimensions, does not the weak man grow, when he speaks these words: It is no longer the Jew demanding his pound of flesh: it is the law of Venice itself knocking at the door of Justice; for his rights and the law of Venice are one and the same; they both stand or fall together."[2]

Sec. 98. Tender in open court.—

"*Por.* Is he not able to discharge the money?
Bass. Yes, here I tender it for him, in the court;
Yea, twice the sum: if that will not suffice,
I will be bound to pay it ten times o'er,
On forfeit of my hands, my head, my heart:
If this will not suffice, it must appear
That malice bears down truth."[3]

Bassanio's act, accompanied with the money and these words: "Here I tender it for him in the court," would have the force and effect of a legal judicial tender of the money due to Shylock, for since the debt incurred by Antonio was really on account of Bassanio, he would have sufficient authority from the debtor to appear for him and make the tender.[4] The money is generally required

[1] Merchant of Venice, Act IV, Scene I.
[2] Von Ihering's Struggle for Law (5th Ed.), 81.
[3] Merchant of Venice, Act IV, Scene I.
[4] Coke, Litt. 206; 2 Maule & S. 86.

to be present and actually offered, but of course the refusal of Shylock to receive the money amounted in law to a legal waiver of the actual production of the money.[1]

The Court's decision as to the effect of this tender, however, in the course of the decision, as depriving Shylock of his principal, was not according to the law of England, as the only result attached to a rejected tender was to put a stop to accruing damages and interest on the debt tendered and refused.[2]

Sec. 99. Effect of legal precedent.—

"*Bass.* . . . . . Wrest once the law to your authority:
To do a great right, do a little wrong;
And curb this cruel devil of his will.
Por. It must not be; there is no power in Venice
Can alter a decree established:
'Twill be recorded for a precedent;
And many an error, by the same example,
Will rush into the state: it cannot be."[3]

---

[1] 2 Maule & S. 86; 2 Parsons, Contr. 154.
[2] 3 Q. B. 915; 11 M. & W. Exch. 356.

Ophelia and her Father, Polonius, are made to discuss the legal subject of a tender, in Hamlet, as follows:

"*Oph.* He hath, my lord, of late, made many tenders
Of his affection to me.
Pol. Affection? puh: you speak like a green girl,
Unsifted in such perilous circumstance.
Do you believe his tenders, as you call them?
Oph. I do not know, my lord, what I should think.
Pol. Marry, I'll teach you: think yourself a baby;
That you have ta'en these tenders for true pay
Which are not sterling. Tender yourself more dearly;
Or (not to crack the wind of the poor phrase,
Wronging it thus,) you'll tender me a fool."
(Act I, Scene III.)

Tender is referred to in the LXXXIII' Sonnet, as follows:

"I found, or thought I found, you did exceed
The barren tender of a poet's debt." (3, 4.)

[3] Merchant of Venice, Act IV, Scene I.

The Poet here refers to the doctrine of *stare decisis,* and the sacredness of established precedents in the law, which have been truly said to be the real "bulwarks" of the law. From the time of Edward III to that of Elizabeth, the inviolability of established precedents was inculcated by the courts and lawyers with more zeal, perhaps, than at any other period in English history.[1] Speaking of the necessity of adherence to precedents, in the administration of the law, Chancellor Kent said: "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made, upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and conduct by it. . . . If judicial decisions were to be lightly disregarded we should disturb and unsettle the great landmarks of property."[2] Hence, the legal conclusion of the court, on the suggestion that the settled rules of law be set aside for this particular case, that it could not be; " 'Twill be recorded for a precedent; and many an error by the same example will rush into the state," since "there is no power in Venice can alter a decree established," evidences the fact that the Poet made the same adherence to precedent, which had always obtained in England, prevalent in Venice, too.

---

[1] Kent said: "Throughout the whole period of the Year Books, from the time of Edward III, to that of Henry VII, the judges were incessantly urging the sacredness of precedents and that a Counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught." 1 Kent's Comm. (12th Ed.) 476; 33 Hen. VI, 41.

[2] 1 Kent's Com. (12 Ed.), 476.

Sec. 100. Portia's judgment on the bond.—

"*Por.* Why, this bond is forfeit;
And lawfully by this the Jew may claim
A pound of flesh, to be by him cut off
Nearest the merchant's heart: . . . .
For the intent and purpose of the law
Hath full relation to the penalty,
Which here appeareth due upon the bond: . . . .
Therefore, lay bare your bosom. . . . .
Are there balance here, to weigh the flesh? . . . .
Have by some surgeon, Shylock, on your charge,
To stop his wounds, lest he do bleed to death. . . . .
It is not so expres'd; but what of that?
'Twere good you do so much for charity. . . . .
A pound of that same merchant's flesh is thine;
The court awards it and the law doth give it. . . . .
And you must cut this flesh from off his breast;
The law allows it and the court awards it. . . . . .
Tarry a little; there is something else.—
This bond doth give thee here no jot of blood;
The words expressly are, a pound of flesh:
Take then thy bond; take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

Shy. Is that the law?

Por. Thyself shalt see the act:
For, as thou urgest justice, be assur'd,
Thou shalt have justice, more than thou desir'st. . . .

Shy. I take this offer then;—pay the bond thrice and let the Christian go.

Bass. Here is the money.

Por. Soft;
The Jew shall have all justice;—soft: no haste;—
He shall have nothing but the penalty. . . . .
Therefore, prepare thee to cut off the flesh.
Shed thou no blood; nor cut thou less, nor more,
But just a pound of flesh: if thou tak'st more,
Or less, than a just pound—be it but so much
As makes it light or heavy, in the substance,
Or the division of the twentieth part
Of one poor scruple; nay, if the scale do turn
But in the estimation of a hair,—

Thou diest and all thy goods are confiscate. . . . .
Why doth the Jew pause? Take thy forfeiture.
Shy. Give me my principal and let me go.
Bass. I have it ready for thee; here it is.
Por. He hath refused it in the open court;
He shall have merely justice and his bond. . . . .
Shy. Shall I not have barely my principal?
Por. Thou shalt have nothing but the forfeiture,
To be so taken at thy peril, Jew.
Shy. Why then, the devil give him good of it,
I'll stay no longer question.
Por. Tarry, Jew,
The law hath yet another hold on you.
It is enacted in the laws of Venice,
If it be proved against an alien,
That by direct or indirect attempts,
He seek the life of any citizen,
The party, 'gainst the which he doth contrive,
Shall seize one-half his goods; the other half
Comes to the privy coffer of the state;
And the offender's life lies in the mercy
Of the duke only, 'gainst all other voice.
In which predicament, I say thou stand'st:
For it appears, by manifest proceeding,
That indirectly and directly too,
Thou has contrived against the very life
Of the defendant; and thou ha'st incurr'd
The danger formerly by me rehearsed.
Down, therefore, and beg mercy of the duke."[1]

Subjected to critical legal analysis, it would seem that injustice was done to Shylock, by this judgment. The validity of the bond, in the first instance, ought not to have been recognized, but after its recognition, by the Court, it ought not, subsequently to have been invalidated by such cunning as was indulged in by Portia. The decision is presented as the only possible one, before the law, as no one in Venice doubted the validity of the bond. Antonio, his friends, the court and all were agreed that the bond gave him a legal right and after the decision of the Court to this effect, and the entire assembly regarded his

[1] Merchant of Venice, Act IV, Scene I.

case as won, then the Court struck down the previously recognized right, by the strategem that the bond gave him no blood, but only the pound of flesh. Of course, since there could be no flesh without blood, in recognizing the right to take the flesh, the Jew legally would have had all incidental powers necessary to the full enjoyment of the affirmative legal right and could draw the blood, as a necessary incident of his right to take the flesh, for without it, his right could not be exercised. It was axiomatic, at common law, that where one had a legal right, he had all the remedies necessary to a full enjoyment of that right, for otherwise the right itself would be without avail.

Viewing the humbled Jew, after the rendition of this decision, with all the pathos that the picture of the Poet presents, as the disappointed seeker after justice, who had such entire faith in law and the justice of his cause, would naturally suggest to the scientific jurist, Dr. Von Ihering, in his Struggle for Law, observed of this trial scene: "When he finally succumbs under the weight of the judge's decision, who wipes out his rights by a shocking piece of pleasantry; when we see him pursued by bitter scorn, bowed, broken, tottering on his way, who can help feeling that in him the law of Venice is humbled; that it is not the Jew, Shylock, who moves painfully away, but the typical figure of the Jew in the middle ages, that pariah of society, who cried in vain for justice? His fate is eminently tragic, not because his rights are denied him, but because he, a Jew, of the middle ages has faith in the law—we might say just as if he were a Christian—a faith in the law firm as a rock, which nothing can shake and which the judge himself feeds, until the catastrophe breaks upon him like a thunder clap; dispels the illusion and teaches him that he is only the despised medieval Jew to whom justice is done by defrauding him."[1]

[1] Von Ihering's Struggle for Law, pp. 81, 82 (5th Ed.). Speaking further of this decision, in a footnote, the learned Von Ihering

also observed: "The eminently tragic interest which we feel in Shylock I find to have its basis precisely in the fact that justice is not done him; for this is the conclusion to which the lawyer must come. The Poet is, of course free to build up his own system of jurisprudence, and we feel no reason to regret that Shakespeare has done so here; or rather that he has changed the old fable in nothing. But when the jurist submits the question to a critical examination, he can only say that the bond was, in itself, null and void because its provisions were contrary to good morals. The Judge should, therefore have refused to enforce its terms on this ground from the first. But as he did not do so, . . . but admitted its validity, it was a wretched subterfuge, a miserable piece of pettifoggery, to deny the man whose right he had already admitted, to cut a pound of flesh from the living body, the right to the shedding of the blood, which necessarily accompanied it. Just as well might the judge deny to the person whose right to an easement he acknowledged, the right to leave footmarks on the land, because this was not expressly stipulated for in the grant." Von Ihering's Struggle for Law, (5th Ed.) pp. 82, 83.

Notwithstanding the total absence of justice, when judged by strict legal rules and formulas, in this judgment, such writers as Doctor Hudson, in commenting on this trial scene, speaking of the judgment, said: "In her judge-like gravity and dignity of deportment; in the extent and accuracy of her legal knowledge; in the depth and appropriateness of her moral reflections; in the luminous order, the logical coherence, and the beautiful transparency of her thoughts, she almost rivals our Chief Justice Marshall."

In the gravity and deportment and the beautiful and dramatic presentation of the climax, this may be true, but surely not in the "extent and accuracy of her legal knowledge." Chief Justice Marshall's judgments were according to established legal precedents and rules of law; by his opinions property rights were sustained and not stricken down by pleasantries or subterfuges. Of what avail is it, to a litigant, whose rights have been denied him, by improper legal standards, that the jurist who pronounced the judgment was becomingly garbed, or pronounced the opinion, striking down his rights, with eloquence and sophistry? The only thing a litigant cares about is securing a righteous judgment in his cause. If he loses his cause, it is immaterial that the executioner of his rights was of noble mien, in the denial of the law, as applied to his cause. The becoming picture of Portia, presented by the Poet, viewed by the lawyer, fails to attract, as

Sec. 101. Commutation of punishment.—

"*Duke.* That thou shalt see the difference of our spirit,
I pardon thee thy life, before thou ask it:
For half thy wealth, it is Antonio's;
The other half comes to the general state,
Which humbleness may drive unto a fine."[1]

A pardon is an act of grace, from the power intrusted with the execution of the laws, which exempts the one upon whom it is bestowed from the punishment inflicted for the crime committed.[2] The pardon, here, unasked, of the life of Shylock, forfeited by the law, for the offense he had committed in conniving at the life of a human being, is a familiar form of extending the pardoning power. As a pardon does not generally affect the rights of any other whose status would be affected thereby, if it operated upon other than the criminal,[3] the Duke recognizes that the right of Antonio to the half of the culprit's property shall not be affected by the pardon.

The Duke's promise to Shylock that "humbleness" might "drive into a fine" the forfeiture of the other half of his estate, is, virtually, a promise of a commutation of his punishment, in this regard, by changing the punishment of a forfeiture of half of his estate, into a less severe one, by way of a fine.[4]

---

does the dejected picture of the poor old Jew, denied his supposed legal rights for improper reasons. Such a judgment is not regarded with rapt admiration by those who appreciate the majesty of the law, nor is the jurist pronouncing such an opinion surrounded by a legal halo, but as the recipient of an erroneous judgment and one whose cause was wrecked upon the shoals of judicial shipwreck, the Jew is regarded with commiseration, rather than the contempt that the laity heap upon him.

[1] Merchant of Venice, Act IV, Scene I.
[2] 4 Bl. Com. 400; 1 Park, Cr. Cas. 47.
[3] 10 Johns. (N. Y.) 232.
[4] Bouvier's Law Dictionary.

Sec. 102. Conveyance in use.—

"*Ant.* So please my lord the duke, and all the court,
To quit the fine for one-half of his goods;
I am content, so he will let me have
The other half in use,—to render it,
Upon his death, unto the gentleman
That lately stole his daughter:
Two things provided more,—That, for this favor,
He presently become a Christian;
The other that he do record a gift,
Here in the court of all he dies possess'd,
Unto his son Lorenzo, and his daughter."[1]

A use, in English law, was a confidence reposed in the tenant of land that he should dispose of the land according to the intention of the *cestui que use,* or him to whose use it was granted, and suffer him to take the profits. The use was the benefit or profit of the land held by the trustee for the benefit of the beneficiary. He to whose use or benefit the trust was intended was called the *cestui que use.*[2] Before the Statute of Uses, in the reign of Henry VIII, uses were customarily used for the purpose of making devises of land.[3] By this statute the use was transferred into possession, or the possession to the use, and the use was then called a vested use.[4] After the statute, as before, a land owner could still make a conveyance to use, and the use could change from one to another, as before the statute, but the statute had the effect of vesting the legal estate and giving full effect to the transfer or disposition.[5]

This means of conveying the half of his estate, therefore, proposed by Antonio, according to the English law, was a perfectly proper conveyance by which half his estate could be devised,[6] and the deed of gift, as a further exac-

[1] Merchant of Venice, Act IV, Scene I.
[2] Tiedeman, R. P. (3d Ed.) Ch. Uses and Trusts.
[3] IV Reeve's History Eng. Law, pp. 363, 366.
[4] 27 Henry VIII, c. 10.
[5] IV Reeve's History Eng. Law, p. 366.
[6] *Ante idem.*

tion, by means of the gift of land *liberum maritagium*,[1] would furnish a further legal safeguard for the vesting of the estate in the daughter and son in law of the Jew.

Sec. 103. Deed of gift.—

"*Duke.* He shall do this; or else I do recant
The pardon that I late pronounced here.
Por. Art thou contented, Jew; what dos't thou say?
Shy. I am content.
Por. Clerk, draw a deed of gift.
Shy. I pray you, give me leave to go from hence;
I am not well; send the deed after me,
And I will sign it."[2]

The exaction of the deed of gift, as the price of Shylock's freedom from punishment, comes dangerously near to duress, but the validity of the deed on this ground would not be apt to be presented, so long as the withdrawal of the pardon threatened the grantor in the deed.

A deed is generally defined to be any writing, containing a contract, sealed and delivered by the parties thereto.[3] A deed of gift, unlike a deed of "grant, bargain and sale," is based only on a good consideration, such as love and affection, as distinguished from a valuable consideration, such as money or property.[4] At an early period in English history, land was conveyed without a writing, by overt acts and ceremonies, taking the place of formal writing, but by the statute of frauds and perjuries,[5] any contract or sale of lands was required to be in writing, signed by the grantor.

Deeds or writings, in English law, date principally from the Norman Conquest.[6] Under the reign of Henry III, there were various deeds of gift in vogue, all of which are

---

[1] IV Reeves' History Eng. Law, p. 90.
[2] Merchant of Venice, Act IV, Scene I.
[3] Tiedeman, R. P. (3d Ed.) Sec. 854; 2 Washburn, R. P. 553.
[4] *Ante idem.*
[5] 29 Chas. II, Ch. 3.
[6] 1 Reeves' History Eng. Law, p. 336.

described by Bracton,[1] the most common of these being called deeds of gift *libera et pura donatio* and those *sub conditione.*

The Poet shows a familiarity with the various kinds of deeds of gift, for as Antonio had exacted that the deed should be "unto his son Lorenzo and his daughter," it would come within the class of deeds made on or after the espousal, by some friend or relative of the bride, whereby the land was given to them jointly, with such condition that although the wife should have no heirs, the husband would possess it, *per legem Angliae.*[2]

[1] Bracton, 10b; II Reeve's History Eng. Law, p. 83.

[2] Bracton, 22b; II Reeve's History Eng. Law, p. 91.

In delivering this deed of gift, to Lorenzo, Nerissa said: "There do I give to you and Jessica, From the rich Jew, a special deed of gift, After his death of all, he dies possess'd of." (Merchant of Venice, Act IV, Scene I.)

CHAPTER X.

"AS YOU LIKE IT."

Sec. 104. Primogeniture.
105. Bequest.
106. Heir.
107. Testament.
108 "Be It Known By These Presents."
109. Bankrupt.
110. Forfeiture of land.
111. Writ *Extendi facias.*
112. Vacations of Court.
113. Jointure.
114 Acts by Attorneys.
115. Examining Justice.

Sec. 104. Primogeniture.—

"*Orl.* The courtesy of nations allows you my better, in that you are the first-born; but the same tradition takes not away my blood, were there twenty brothers betwixt us; I have as much of my father in me as you; albeit, I confess, your coming before me is nearer to his reverence."[1]

The law of primogeniture or the right of the first-born under the English law is here referred to, as inconsistent with the natural rights of the younger child. Under the law as it existed in England, the oldest son acquired title to the parent's lands, in preference to the younger children.[2] This is noted, by Orlando, as a legal advantage only, for he vaunts that he has "as much of my father in me as you;" that the arrival first would not affect his blood and that he is, in other respects his equal, if not his superior.

---

[1] As You Like It, Act I, Scene I.

[2] This unjust distinction has been very generally abolished in the United States. Bouvier's Law Dictionary.

Clifford asks Edward, in 3' Henry VI: "*Clif.* And reason, too; Who should succeed the father, but the son?" (Act II, Scene II.)

Sec. 105. Bequest.

"*Orl.* As I remember, Adam, it was upon this fashion bequeathed me; By will, but a poor thousand crowns, and, as thou say'st, charged my brother, on his blessing, to breed me well; and there begins my sadness."[1]

A bequest, is a gift of personal property, by will, in contradistinction to a *devise* of real estate.[2] A sum of money could not be devised, but such sum would be "bequeathed" instead.

---

[1] As You Like It, Act I, Scene I.

[2] Wigram, Wills, 11.

In King John, the Mother of the King, said to Phillip:

"*Eli.* I like thee well; Wilt thou forsake thy fortune,
Bequeath thy land to him, and follow me?
I am a soldier and now bound to France." (Act I, Scene I.)

On regaining his armour, Pericles, Prince of Tyre, identifies it in the hands of the fishermen as the armour that "my dead father did bequeath to me," as a "part of mine heritage." (Act II, Scene I.)

After determining to die, when Collatine shall know the cause of her untimely death, Lucrece concludes:

"My stained blood to Tarquin I'll bequeath,
Which by him tainted shall for him be spent,
And as his due, writ in my testament." (1181, 1183.)

In language entirely legal, in form, Lucrece asks of her husband, in her complaint:

"Dear Lord of that dear jewel I have lost,
What legacy shall I bequeath to thee?" (1191, 1192.)

Further on she is made to say—

"This brief abridgment of my will I make;
My soul and body to the skies and ground."

And she appoints her husband executor of her will, in this language:

"Thou, Collatine, shalt oversee this will." (1198, 1199, 1205.)

In the fourth Sonnet, the Poet asks of Loveliness, which is personified:

"Unthrifty loveliness, why dost thou spend
Upon thyself thy beauty's legacy?
Nature's bequest gives nothing, but doth lend,
And being frank, she lends to those are free."

Sec. 106. Heir.

"*Cel.* You know, my father has no child but I, nor none is like to have; and, truly, when he dies, thou shalt be his heir: for what he hath taken away from thy father, perforce, I will render thee again, in affection; by mine honor, I will."[1]

The use of the word "heir" here is in the sense of an "heir apparent," or as one who had the indefeasible right to the inheritance, provided she outlive the ancestor, her father. In postponing the realization of her promise to convey the property realized from her own father, to Rosalind, the Poet did not overlook the contingency upon which the heirship depended, in law, i. e., the death of the speaker's father, for it is a legal axiom that no one can be the heir of a living person,[2] hence the promise to make Rosalind the "heir" of her own father to the extent of the property taken from her parent, "when he dies."

. . . . . .

"Then how, when nature calls thee to be gone,
What acceptable audit can'st thou leave?
Thy unused beauty must be tomb'd with thee,
Which, used, lives th' executor to be."

[1] As You Like It, Act I, Scene II.

[2] 2 Bl. Comm. 208.

Antigonus, in Winter's Tale, referring to his three daughters, said: "They are co-heirs; and I had rather glib myself, than they should not produce fair issue." (Act II, Scene I.)

And, in the same play, Florizel, son of Polixenes, said to his father: "*Flo.* . . . From my succession, wipe me, father, I am heir to my affection." (Act IV, Scene III.)

In King Richard II, the Queen said of Bolingbroke:

"*Queen.* So, Green, thou art the midwife to my wo,
And Bolingbroke my sorrow's dismal heir."
(Act II, Scene II.)

In King Richard II, the Duke of York thus addressed Bollingbroke:

"*York.* Great duke of Lancaster, I come to thee,
From plume pluck'd Richard; who, with willing soul,
Adopts thee heir and his high scepter yields
To the possession of thy royal hand." (Act IV, Scene I.)

Sec. 107. Testament.—

"*Orl.* My father charged you in his will to give me good education: you have trained me like a peasant, obscuring and hiding from me all gentleman-like qualities: the spirit of my father grows strong in me, and I will no longer endure it: therefore allow me such exercises as may become a gentleman, or give me the poor allottery my father left me by testament."[1]

The Bishop of Ely, urged the King to make war upon France, as follows, in Henry V: "*Ely.* Awake remembrance of these valiant dead, and with your puissant arm, renew their feats; you are their heir, you sit upon their throne." (Act I, Scene II.)

Describing the attempt to overthrow Henry V, Mortimer tells Richard Plantagenet, in 1' Henry VI: "*Mor.* . . . But mark; as, in this haughty great attempt, They laboured to plant the rightful heir, I lost my liberty and they their lives." (Act II, Scene V.)

Mortimer tells Richard Plantagenet of his heirship, in 1' Henry VI, as follows: "The first begotten, and the lawful heir of Edward king, the third of that descent." (Act II, Scene V.)

Speaking of the treason of Horner, Suffolk said, in 2' Henry VI: "*Suff.* His words were these;—that Richard, duke of York, was rightful heir unto the English crown; and that your majesty was an usurper." (Act I, Scene III.)

Henry VI, in 3' Henry VI, thus deplores his condition: "*K. Hen.* I know not what to say; my title's weak. Tell me, may not a king adopt an heir?

York. What then?

K. Hen. An if he may, then am I lawful king:

For Richard, in the view of many lords,
Resign'd the crown to Henry the Fourth;
Whose heir my father was, and I am his." (Act I, Scene I.)

Edward tells Queen Margaret, in 3' Henry VI: "*Edw.* I am his king and he should bow his knee; I was adopted heir by his consent." (Act II, Scene II.)

On learning that Richmond was on the seas, bent on landing an army in England, King Richard III, said: "*K. Rich.* What heir of York is there alive, but we? And who is England's king, but great York's heir? Then, tell me, what makes he upon the seas?" (Act IV, Scene IV.)

[1] As You Like It, Act I, Scene I.

The Roman word testament, is here used, in preference to the English word "will," a synonym for the instrument whereby a person alienated his estate after his death. A testament is the final declaration of a person, with reference to the disposition of his property.[1] The older son, having been selected as the testamentary guardian, of the speaker, would naturally be charged with his education by the will and the charge of failure to discharge this trust of the testator, was a reason why the personal estate of the ward should be delivered over, even before the ward arrived at his maturity, as he could then demand his legal rights, under the father's will.

[1] Swinburne, Wills, Sec. 2.

In King John, in the quarrel between Elinor and Constance, the following occurs: "*Eli.* Thou unadvised scold, I can produce a will that bars the title of thy son.

Const. Ay, who doubts that? a will: a wicked will;
A woman's will; a canker'd grandam's will."

(Act II, Scene I.)

Reference to a testament is also made, in As You Like It (Act II, Scene I), as follows:

"1 *Lord.* O, yes, into a thousand similies.
First, for his weeping in the needless stream;
Poor deer, quoth he, *thou mak'st a testament,*
As worldlings do, giving thy sum of more,
To that which had too much."

Speaking of the death of the duke of York, at the battle of Agincourt, the duke of Exeter, said: "*Exe.* . . He threw his wounded arm and kiss'd his lips; and so, espoused to death, with blood he seal'd a testament of noble-ending love." (Henry V, Act IV, Scene VI.)

Joan of Arc, in 1' Henry VI, said to Talbot: "*Puc.* . . . Help Salisbury to make his testament: This day is ours, as many more shall be." (Act I, Scene V.)

The Painter tells the Poet, in Timon of Athens: "*Pain.* . . performance is a kind of will and testament, which argues a great sickness in his judgment that makes it." (Act V, Scene I.)

On visiting Antioch, Pericles, Prince of Tyre, thus refers to his intention of making his will:

Sec. 108. Be it known by these presents.—

"*Le Beau.* Three proper young men, of excellent growth and presence;—
"*Ros.* With bills on their necks,—*Be it known unto all men by these presents.*"[1]

This play upon the use of the word "presence," by the substitution of the legal terms employed, shows the perfect familiarity of the Poet, with all forms of legal expression. The words, "Be It Known Unto All Men By These Presents," is a form of legal terms used at the commencement of legal documents and papers, such as deeds and writs, by way of warning or to make the instrument impressive.

Sec. 109. Bankrupt.—

"1 *Lord.* Anon, a careless herd, full of the pasture,
Jumps along by him and never stays to greet him;
Ay, quoth Jaques, *sweep on, you fat and greasy citizens;*
'Tis just the fashion: Wherefore do you look
Upon that poor and broken bankrupt there."[2]

A "bankrupt" is a broken up, or ruined trader.[3] When one becomes a bankrupt, as his credit is so far impaired as to render it impossible for him to do business in his

---

"*Per.* I'll make my will then, and, as sick men do,
Who know the world, see heaven, but feeling wo,
Gripe not at earthly joys, as erst they did."
(Act I, Scene I.)

[1] As You Like It, Act I, Scene II.

John Cade assumes the legal form in addressing Lord Say, in 2' Henry VI, when he says: "*Cade.* . . . *Be it known unto thee* by these presence, even the presence of lord Mortimer, that I am the besom that must sweep the court clean of such filth as thou art." (Act IV, Scene VII.)

Lucius assumes the legal formula, in Titus Andronicus, when he says: "Then, noble auditory, *Be It Known to you,*" etc. (Act V, Scene III.)

[2] As You Like It, Act II, Scene I.

[3] 3 Stor. C. C. 453; 2 Bl. Comm. 471.

own name, where credit is essential, the commercial world generally "sweeps on" past such bankrupt, without the former business courtesies. The Poet's reference to such commercialism, as the fashion of such "fat and greasy citizens," to so "look" upon the "poor and broken bankrupt" illustrates the deep sympathy, akin to the "divine gift of pity," which he felt for the afflicted of his kind.

In Comedy of Errors (Act IV, Scene II) Dromio is made to say: "*Dro.* Time is a very bankrupt, and owes more than he's worth to season."

Speaking of the policies of King Richard II, Lord Ross said to Lord Willoughby:

"*Ross.* The earl of Wiltshire hath the realm in farm,
Willo. The king's gone bankrupt, like a broken man."
(Act II, Scene I.)

York observed, on the death of Gaunt, in Richard II:

"*York.* Be York the next that must be bankrupt so:
Though death be poor, it ends a mortal wo."
(Act II, Scene I.)

In abdicating the throne, King Richard II, said:

"*K. Rich.* . . . An if my word be sterling yet in England,
Let it command a mirror hither straight,
That it may show me what a face I have,
Since it is bankrupt of his majesty." (Act IV, Scene I.)

In Romeo and Juliet (Act III, Scene II), Juliet is made to say: "O, break, my heart; poor bankrupt, break at once."

In Venus and Adonis, it is said: "A smile recures the wounding of a frown; But blessed bankrupt, that by love so thriveth." (465, 466.)

In The Rape of Lucrece, covetousness is thus referred to:

". . . gaining more, the profit of excess
Is but to surfeit, and such griefs sustain,
That they prove bankrupt in this poor-rich gain." (138, 140.)

After the perpetration of his crime Tarquin is described:

"With heavy eye, knit brow, and strengthless pace,
Feeble Desire, all recreant, poor and meek,
Like to a bankrupt beggar wails his case." (709, 711.)

The following occurs in the LXVII' Sonnet:

"Why should he live, now Nature bankrupt is,
Beggar'd of blood to blush through lively veins?" (9, 10.)

Sec. 110. Forfeiture of land.—

"*Duke Fr.* . . . . . But look to it;
Find out thy brother, wheresoe'er he is.
Seek him with candle; bring him dead or living
Within this twelvemonth, or turn thou no more
To seek a living in our territory.
Thy lands and all things that thou dost call thine
Worth seizure, do we seize into our hands."[1]

This is tantamount to a declaration on the part of the Duke, to forfeit the title of Oliver, to his lands and tenements, unless he can deliver his brother, Orlando, to the Duke within a year, and to confiscate, by seizure and attainture all the lands of which he is seized.

It was the principle of the common law—still recognized in the law of real property[2]—that the paramount title or right to the property of the citizen rested in the sovereign, or Government, and that for just cause this title could be forfeited, or confiscated.

Sec. 111. Writ extendi facias.—

"*Duke Fr.* . . Well, push him out of doors,
And let my officers of such a nature
Make an extent upon his house and lands."[3]

After declaring that he will confiscate and forfeit all the lands of Oliver, if he does not deliver Orlando to him within a year, the Duke, in this verse, advises Oliver to turn the real estate, "his house and lands," over to the proper officer of the Duke, under a writ *extendi facias*. This is the writ, that, at common law, issued, after forfeiture or judgment, against the lands and tenements of the person named in the writ.[4] Writs *fieri facias*, issued against the personal estate of the debtor, while *extendi facias*, issued against his real estate and, in this connec-

[1] As You Like It, Act III, Scene I.
[2] Tiedeman, R. P. (3d Ed.), Sec. 1.
[3] As You Like It, Act III, Scene I.
[4] Bouvier's Law Dictionary.

tion, it is noteworthy that the Poet uses the terms properly, for the writ is spoken of as one properly reaching the real estate of the absent Orlando.[1]

Sec. 112. Vacation of court.—

"*Ros.* . . . . I'll tell you who time ambles withal, who time trots withal, who time gallops withal, and who he stands still withal.
Orl. . . . . Who stays it still withal?
Ros. With lawyers in the vacation: for they sleep between term and term and then they perceive not how times moves."[2]

In practice, the space of time for which a court holds its session, is called a "term"[3] and the period of time between the end of one term of court and the beginning of another term, is called the "vacation."[4] In vacation, as only the most urgent orders and rules are made by the Judge, in Chambers, this is the dull season for lawyers, when they could properly "sleep" so that they would "perceive not how time moves."

Sec. 113. Jointure.—

"*Ros.* Nay, an you be so tardy, come no more in my sight; I had as lief be woo'd of a snail?
Orl. Of a snail?
Ros. Ay, of a snail; for though he comes slowly, he carries his house on his head; a better jointure, I think, than you can make a woman."[5]

---

[1] Furness shows that the terms are not properly used in this connection, as the writ *extendi facias*, only issued after judgment or a forfeiture, but as the declaration of the Duke is tantamount to a forfeiture of the goods, lands and property of Orlando, and a declaration of an intent to also work a forfeiture of Oliver's lands, the use of the terms is not so inappropriate, after all.

[2] As You Like It, Act III, Scene II.

[3] Bouvier's Law Dictionary.

[4] *Ante idem.*

[5] As You Like It, Act IV, Scene I.

A "jointure," in the broader sense, is a joint estate limited to both husband and wife.[1] At common law, a jointure was said to require a competent livelihood of freehold, for the wife, in lands or tenements, to take effect, in profits, or possession, after the death of the husband.[2] It was essential that the estate be limited to the wife herself; that it be in satisfaction of the wife's dower and that it should be made before marriage.[3] If so created, the jointure would bar a claim for dower, in the lands of the husband, if this estate was claimed, but otherwise not.[4]

A bridegroom, presenting a house, by way of jointure, to his wife, before marriage, would create such an estate in her by way of "jointure," if the gift was so conditioned, hence the application of the term is proper, in the way it is used.

Sec. 114. Acts by Attorneys.—

"*Orl.* Then, in mine own person, I die.
Ros. No faith, die by attorney. The poor world is almost six thousand years old and in all this time

[1] 2 Bl. Comm. 137; Tiedeman, R. P. (3d Ed.) 117.
[2] Cruise Dig. tit. 7; 2 Bl. Comm. 137.
[3] 2 Bl. Comm. 137.
[4] Tiedeman, R. P. (3d Ed.) 117.

In bidding for the hand of Bianca, in Taming of the Shrew, Tranio is made to say:

"*Tra.* I'll leave her houses, three or four as good,
Within rich Pisa's walls, as any one,
Old signior Gremio has in Padua;
Besides, two thousand ducats by the year,
Of fruitful land, all which shall be her jointure."
(Act II, Scene I.)

Lewis, of France, thus replies to Warwick, in 3' Henry VI: "*K. Lew.* And now, forthwith, shall articles be drawn, Touching the jointure that your king must make." (Act III, Scene III.)

On the reconciliation, in Romeo and Juliet, Capulet is made to say, to Montague:

"*Cap.* O, brother Montague, give me thy hand:
This is my daughter's jointure, for no more
Can I demand." (Act V, Scene III.)

there was not one man died in his own person, *videlicet*, in a love cause."[1]

The use of the term "Attorney" here is in the sense of one appointed by another to perform some act for him, as distinguished from an attorney at law, who, as an officer of a court of justice, is retained to perform some service in connection with a pending cause before the court.

An attorney in fact is one who acts under a special appointment for the commission of some certain act, or the performance of general acts in some particular business.[2] The play upon the word is in the legal sense only, for instead of dying in his "own person," the request is that he die by "attorney." Acts by attorney, are very properly distinguishable from those in one's own person and while the effect in law, is the same and the principal is liable for the acts of his attorney, duly authorized, the same as if personally performed, this, of course, could not be true of such an act as that mentioned for to die, by an attorney, would be not to die in person.

Sec. 115. Examining Justice.—

"*Ros.* Well, time is the old justice that examines all such offenders and let time try."[3]

The comparison of an examining magistrate to Time, that tries all offenders, is, in accordance with the uni-

---

[1] As You Like It, Act IV, Scene I.

[2] Bacon, Abr. Attorney; Story, Agency Sec. 25.

Speaking of his offices in wooing Margaret for his sovereign, Suffolk said, in 1' Henry VI: "*Suff.* . . . And yet, methinks, I could be well content, To be mine own attorney in this case." (Act V, Scene III.)

Suffolk urges the King, in favor of Margaret, in 1' Henry VI: "*Suff.* Marriage is a matter of more worth, Than to be dealt in by attorneyship." (Act V, Scene V.)

[3] As You Like It, Act IV, Scene I.

versal law of compensation, which rewards or punishes all offenders of the law, an apt comparison. Time, in the law, often furnishes legal presumptions, for or against a criminal, according to the facts and circumstances surrounding the crime, which makes the similitude the more complete.[1]

[1] Bouvier's Law Dictionary, Time.

CHAPTER XI.

"ALL'S WELL THAT ENDS WELL."

Sec. 116. Wards—Heirs of fortune under King as.
117. Giving testimony against one—Impeachment.
118. Premises.
119. Theft.
120. Descent.
121. Lawful Act.
122. Unlawful Intents.
123. Entail—Remainders.
124. Evidence.
125. Divorce.

Sec. 116. Wards—Heirs of fortune under King as.—

"*Bertram.* And I in going, madam, weep o'er my father's death anew; but I must attend his majesty's command, to whom I am now in ward, evermore in subjection."[1]

A ward, in law, is one who is under the guardianship and subject to the care and control of his guardian, until he is emancipated by the law, or becomes of age.[2] In England, the heirs of large fortunes were held to be the King's wards. This was an incident of the old feudal system, by virtue of which the lord of the manor had the care of his tenants' person during his minority, for, in legal contemplation, all citizens owning real estate are but tenants of the crown.[3]

---

[1] All's Well That Ends Well, Act I, Scene I.

[2] Bouvier's Law Dictionary.

[3] Tiedeman, R. P. Chap. 1 (3d ed.).

This custom of wardship did not obtain in France, but Shakespeare gives the manners and customs and laws of England to all other countries, then he follows the original story, in holding that the King had the right to select a wife for Bertram. Rolfe's "All's Well That Ends Well," p. 151, notes.

Sec. 117. Giving testimony against one—Impeachment.—

"*Countess.* Go not about; my love hath in't a bond
Whereof the world takes note. Come, come, disclose
The state of your affection, for your passions
Have to the full appeach'd."[1]

One is said to be impeached, or "appeached," when one's guilt is disclosed by facts or testimony, at variance with the evidence of the party testifying in a court of justice.[2] One who "turns state's evidence" against his co-criminal, is hence said to "'peach" upon his confederate in crime, and when evidence is introduced to break down the character or testimony of a witness, he is said to be impeached or his evidence broken down.[3]

The Countess compares the passions or love of Helena to a witness who has impeached the affection of her heart, hence urges that no further dissembling will avail her.

Sec. 118. Premises.—

"*King.* Here is my hand; the premises observ'd,
Thy will, by my performance shall be serv'd."[4]

"Premises" is here used in the sense of that which has already been put, or according to statements previously made,[5] rather than with the meaning given to such term, in conveyances.

In other words, the King, proposes, on the compliance with the conditions prescribed, that he will perform such acts as the one addressed shall will.

---

[1] All's Well That Ends Well, Act I, Scene III.

[2] Greenleaf, Evid, (14 ed.).

[3] Halliwell-Phillips quotes Palsgrave: "I apeche, I accuse, *j'accuse;* kursed be the preest of God, that dyd apeche me wrongfully and without deservyng." Rolfe's All's Well That Ends Well, 169, notes.

[4] All's Well That Ends Well, Act II, Scene I.

[5] This term is no doubt taken from the Latin *prae*, before and *mittere*, to put. Bouvier's Law Dictionary.

Sec. 119. Theft.—

"*Hel.* I am not worthy of the wealth I owe;
Nor dare I say, 'tis mine; and yet it is;
But, like a timorous thief, most fain would steal,
What law does vouch mine own."[1]

As theft is the secret and wrongful abstraction of the property of another, without his consent,[2] it is of course of the first essence of the crime that the property taken was that of another than the rightful owner, since no man can steal his own property. A thief too timorous to steal from another, would of course not be a thief in taking his own, but the expression illustrates the timidity of Helena, in claiming her lawful rights, as she dare not say "'tis mine; and yet it is."

[1] All's Well That Ends Well, Act II, Scene V.

[2] Allison, Cr. Law, 250.

In Macbeth, Malcolm said to Donalbain: "There's warrant in that theft which steals itself, when there's no mercy left." (Macbeth, Act II, Scene III.)

King Richard II, said of Bolingbroke:

"*K. Rich.* For well we know, no hand of blood and bone
Can gripe the sacred handle of our sceptre,
Unless he do profane, steal, or usurp." (Act III, Scene III.)

In 1' Henry IV (Act I, Scene II) Falstaff said to Prince Henry: "*Fal.* Marry, then sweet wag, when thou art king, let not us, that are squires of the night's body, be called thieves of the day's beauty."

King Henry tells Prince of Wales, in 2' Henry IV: "*K. Hen.* . . . Thou hast stol'n that, which, after some few hours, were thine without offense." (Act IV, Scene IV.)

The duke of Exeter, in Henry V, answering the argument of Westmoreland as to danger from invasions by the Scots, said: "We have locks to safeguard necessaries, and pretty traps to catch the petty thieves." (Act I, Scene II.)

Troilus thus argues for the retention of Helen, in Troilus and Cressida:

"*Trol.* . . O theft most base;
That we have stolen what we do fear to keep?
But, thieves, unworthy of a thing so stolen,
That in their country did them that disgrace,
We fear to warrant in our native place." (Act II, Scene II.)

Sec. 120. Descent.—

"*Hel.* . . . A ring the county wears, that downward hath succeeded in his house, from son to son, some four or five descents, since the first father wore it."[1]

"Descents" is here used in the sense of generations, not as a word showing title to the ring referred to. A title by descent is the title by which one person, on the death of another, acquired the real estate of the latter, as his heir at law.[2] The rules of descent are applicable only to real estate of inheritance and not to personalty.

That the ring has passed from son to son, successively, is in keeping with the English law of primogeniture, which gave the heirlooms, such as that referred to, to the first born, rather than to the younger children.

In justifying thievery, Timon of Athens, is made to say, to the two Thieves who come upon him:

"*Tim.* I'll example you with thievery:
The sun's a thief, and with his great attraction,
Robs the vast sea; the moon's an arrant thief,
And her pale fire she snatches from the sun;
The sea's a thief, whose liquid surge resolves
The moon into salt tears: the earth's a thief,
That feeds and breeds by a composture stolen
From general excrement: each things a thief."
(Act IV, Scene III.)

[1] All's Well That Ends Well, Act III, Scene VII.

[2] 2 Bl. Comm. 201.

In his charges against Mowbray, in King Richard II, Bolingbroke said:

"*Boling.* . . . By the glorious worth of my descent,
This arm shall do it, or this life be spent."
(Act I, Scene I.)

In re-investing Richard Plantagenet with his inheritance, 1' Henry VI, is made to say:

"*K. Hen.* . . If Richard will be true, not that alone,
But all the whole inheritance I give,
That doth belong unto the house of York,
From whence you spring, by lineal descent."
(Act III, Scene I.)

Sec. 121. Lawful act.—

"*Hel.* . . . Let us assay our plot; which, if it speed,
Is wicked meaning in a lawful deed,
And lawful meaning in a lawful act;
Where both not sin and yet a sinful fact."[1]

This verse recognizes the essential of every crime, the wrongful intent, coupled with the wrongful act, in the commission of the crime.[2] A deed not otherwise forbidden by law, may be prompted by a bad intent or wicked object, but yet, as the act itself is lawful no crime is committed, but where both the act and the intent are lawful it never is held to constitute a crime. The sinful intent on the part of Bertram, not being participated in by Helena and she being really his wife, with whom cohabitation was not sinful, there was thus the "wicked meaning in a lawful deed, and lawful meaning in a lawful act," within the contemplation of Helena.

Sec. 122. Unlawful intents.—

"1 *Lord.* Is it not meant damnable in us, to be trumpeters of our unlawful intents?"[3]

To render an act, forbidden by law, criminal, there must always be a criminal or "unlawful intent" in the commission of the act[4] and this is one of the essential elements of

---

Margaret of Anjou said to the weak king, Henry VI, in 2 Henry VI.: "*Q. Mar.* And Humphrey is no little man in England.
First note, that he is near you in descent." (Act III. Scene I.)

The Messenger advises King Henry, in 2' Henry VI: "*Mess.* Jack Cade proclaims himself lord Mortimer, descended from the duke of Clarence's house: And calls your grace usurper, openly." (Act IV, Scene IV.)

Lord Hastings, in Richard III, replies to the suggestion of Catesby, that he join the forces of Richard III: "*Hast.* But, that I'll give my voice to Richard's side, To bar my master's heirs, in true descent, God knows, I will not do it, to the death." (Act III, Scene II.)

[1] All's Well That Ends Well, Act III, Scene VII.
[2] 1 Russell, Crimes, (Greaves Ed.) 48.
[3] All's Well That Ends Well, Act IV, Scene III.
[4] 1 Bishop, Criminal Law, Sec. 221.

the crime, which the prosecution must always establish. Sometimes it is difficult to prove that the commission of an act was prompted by a criminal or "unlawful" intent, hence the conclusion that it would be unpardonable in the speaker to himself act as the trumpeter of his "unlawful intents."

Sec. 123. Entail—Remainders.

"*Par.* Sir, for a *quart d'ecu* he will sell the fee-simple of his salvation, the inheritance of it; and cut the entail from all remainders, and a perpetual succession for it perpetually."[1]

A fee-simple is a freehold estate of inheritance, free from conditions. It is the highest estate known to the law and is absolute, so far as it is possible to possess an absolute right of property in land.[2] Freehold estates are either of inheritance or those not of inheritance,[3] hence the "inheritance" of his salvation, is used as a synonym for the fee-simple absolute estate therein.

An estate tail or an "entail" was an estate of inheritance, that was conditioned to descend to the heirs of the donee's body, instead of to his heirs generally, in a direct line, so long as his direct posterity continued and the estate determined upon the death of the owner without issue.[4] A remainder is the future estate in lands which is supported and preceded by a particular estate in possession, which must determine before the remainder takes effect.[5]

As a fee-simple estate is one free from all "entails" and "remainders," and "perpetual succession" is likewise an incident of such an absolute estate in lands, as distinguished from the more limited estates, with which it is contrasted, in this verse, it is apparent that the terms used are employed in their proper legal sense.

[1] All's Well That Ends Well, Act IV, Scene III.
[2] Teideman, R. P. Sec. 29 (3d ed.).
[3] Tiedeman, R. P. Sec. 26 (3d ed.).
[4] Tiedeman, R. P. Sec. 38 (3d ed.).
[5] Tiedeman, R. P. Sec. 296 (3d ed.).

Sec. 124. Evidence.

"*King.* . . . But thou art too fine in thy evidence; therefore stand aside."[1]

Evidence, in law, includes all the means by which any alleged fact is established or disproved.[2] In the connection in which the word is used in this verse, it means oral evidence, or the testimony of a witness, given *viva voce,* as distinguished from written evidence.[3] As the object of all evidence is to ascertain the truth regarding the fact alleged or disaffirmed, testimony of witnesses is therefore confined to the point in issue and where the witness draws unnecessary distinction, or vacillates from the truth, the witness is sometimes said to be drawing too fine distinctions. The meaning of this is, that instead of meeting the issue, the witness dodges the issue by distinctions and points too fine to be appreciated by those seeking the truth. After a witness has testified it is a common thing for the Counsel or Court to ask the witness to "stand aside," hence the King, on rejecting the testimony offered because the evidence was "too fine," asked the witness to "stand aside."

In Titus Andronicus, Marcus speaks of "the poor remainder of Andronici." (Act V, Scene III.)

Posthumus bids Cymbeline adieu, in the following words: "*Post.* The gods protect you: and bless the good remainders of the court." (Act I, Scene II.)

Polonius tells the Queen, in Hamlet: "*Pol.* For this effect, defective, comes by cause; Thus it remains and the remainder, thus." (Act II, Scene II.)

[1] All's Well That Ends Well, Act V, Scene III.

[2] 1 Greenl. Evid. Sec. 1, Chap. 1.

[3] 1 Phillipps Evid. 166.

Clarence asks of the murderers, before his murder, in King Richard III, Act I, Scene IV: "*Clar.* . . . Where is the evidence that doth accuse me? What lawful quest have given their verdict up unto the frowning judge?"

Clarence tells Brakenbury, in King Richard III: "*Clar.* O, Brakenbury, I have done these things, That now give evidence against my soul." (Act I, Scene IV.)

Sec. 125. Divorce.

"*Hel.* If it appear not plain, and prove untrue,
Deadly divorce step between me and you."[1]

Marriage being a legal relation and not a mere contract, between husband and wife, it takes some legal authority to dissolve the relation and the dissolution or suspension, by law, of such relation, is called divorce.[2] Formerly, in England, ecclesiastic courts alone had jurisdiction over divorce suits and the temporal courts had no authority to dissolve the relation of husband and wife. The divorce absolute was called a divorce from the bonds of matrimony, or *a vinculo matrimonii,* while a mere suspension of the relation was called *a mensa et thoro,* or a denial of the bed and board of the husband or wife.[3]

---

[1] All's Well That Ends Well, Act V, Scene III.

[2] Bishop, Marriage and Divorce, Sec. 292.

[3] Bishop, Marriage and Divorce, Sec. 3.

Polixenes, in Winter's Tale, is made to say, to his son: "*Pol.* Mark your divorce, young sir, whom son I dare not call." (Act IV, Scene III.)

In King Richard II, Bolingbroke thus addressed Bushy and Green:

"*Boling.* . . . You have, in manner, with your sinful hours,
Made a divorce betwixt his queen and him;
Broke the possession of a royal bed,
And stained the beauty of a fair queen's cheeks,
With tears drawn from her eyes, by your foul wrongs."
(Act III, Scene I.)

King Richard II is made to say, to Northumberland:

"*K. Rich.* Doubly divorc'd? Bad men, ye violate
A twofold marriage; 'twixt my crown and me;
And then 'twixt me and my married wife." (Act IV, Scene I.)

Gloster thus divorces his wife, on her arrest for treason, in 2' Henry VI:

"*Glo.* . . . I banish her, my bed and company;
And give her, as a prey to law and shame,
That hath dishonor'd Gloster's honest name."
(Act II, Scene I.)

In speaking of the dissolution of the relation of husband and wife as "deadly," the Poet clearly entertained the present view of the evil effects of divorces, as a blight upon the home life and a remedy to be avoided.

Queen Margaret tells the king, in 3' Henry VI: "*Q. Mar.* . . thou prefer'st thy life, before thine honour; And seeing thou dost, I here divorce myself, Both from thy table, Henry and thy bed, Until that act of Parliament be repealed, Whereby my son is disinherited." (Act I, Scene I.)

Replying to Cardinal Wolsey's advice to trust her cause to the King, permitting him a divorce from her, Queen Katherine said: "*Q. Kath.* Nothing but death shall e'er divorce my dignities." (Act III, Scene I.)

On finding gold in the forest, Timon of Athens, said: "*Tim.* O thou sweet king-killer, and dear divorce, 'twixt natural son and sire: thou bright defiler of Hymen's purest bed." (Act IV, Scene III.)

Desdemona thus pleads with the beast Iago, in Othello:

"That I do not yet, and ever did,
And ever will,—though he do shake me off
To beggarly divorcement,—love him dearly,
Comfort forswear me." (Act IV, Scene II.)

Venus thus addresses death, in Venus and Adonis:

"'Hard-favor'd tyrant, ugly, meager, lean,
Hateful divorce of love,—thus chides she death." (931, 932.)

CHAPTER XII.

"THE TAMING OF THE SHREW."

Sec. 126. Third-borow.
127. Court-leet, or Manor Court.
128. Adversaries at Law.
129. Compounding crime.
130. Servant assaulting master.
131. Punishment by the Pillory.
132. Settlement by way of Assurance.
133. Chattels.
134. "Packing" a witness.

Sec. 126. Third-borow.—

"*Host.* I know my remedy, I must go fetch the third borough.
Sly. Third, or fourth, or fifth borough, I'll answer him by law;
I'll not budge an inch, boy; let him come, and kindly."[1]

A thirdborough, or third-borow,[2] as sometimes called, was an under constable and in old English law was spoken of as an officer holding about the same power and subject to the same limitations as a constable.[3] As a peace officer and one invested with the authority to preserve the peace, he would have had jurisdiction over the person of the offender, in this instance, for disturbance of the peace and destroying the property of the Hostess.

Sec. 127. Court-leet, or manor court.—

"1 *Serv.* O, yes, my lord, but very idle words;
For though you lay here in this goodly chamber,
Yet would you say ye were beaten out of door,

---

[1] Taming of the Shrew, Induction, Scene I.
[2] Bouvier's Law Dictionary.
[3] Lambard, Duty of Const., 6.

In Love's Labour's Lost, the Constable, Dull, is made to say: "*Dull.* I myself reprehend his own person, for I am his grace's tharborough," meaning that he is a peace officer. (Act I, Scene I.)

And rail upon the hostess of the house,
And say you would present her at the leet,
Because she brought stone jugs and no seal'd quarts."[1]

A court-leet was the most ancient court for the trial of criminal cases known to the common law. It was a court of record, with the same jurisdiction in some particular precinct as the sheriff's tourn in the county.[2] This court assumed jurisdiction of those petty offenders, accused of using false weights and measures, hence the conclusion by the servant that the hostess would be presented and charged, at the court-leet, because she used stone-jars, instead of the legal sized, quart-pots, duly sealed and approved.[3]

Sec. 128. Adversaries at law.—

"*Tra.* Please ye we may contrive this afternoon,
And quaff carouses to our mistress' health;
And do as adversaries do in law,—
Strive mightily, but eat and drink as friends."[4]

Manifestly, in Shakespeare's time, as at the present day, the legal profession was noticeable for the absence of professional jealousies, such as characterize the other learned professions in a more marked degree. In the medical profession and in the ministry—where humility and tolerance, it would seem, would prompt the members of such profession to be charitable to their rivals—this jealousy is particularly marked, while in the law, more than in any other of the learned callings, opponents to-day, as in the time of Shakespeare, "Strive mightily, but eat and drink as friends."

---

[1] Taming of the Shrew, Induction, Scene II.

[2] 4 Bl. Comm. 273.

[3] Rolfe's Taming of the Shrew, p. 158, notes.

[4] Taming of the Shrew, Act I, Scene II.

This verse is evidence of the fact that the Poet not only knew the law but lawyers, as well. Perhaps this is why he knew the law, because of his association with lawyers. This verse is not

Sec. 129. Compounding crime.—

"*Hor.* . . . Rise, Grumio, rise; we will compound this quarrel."[1]

Compounding a felony or misdemeanor rendered the party so compounding such an offense, an accessory, at common law.[2] Any act whereby the prosecutor or aggrieved person, for a reward, agreed not to prosecute the offense was a compounding of the crime.[3] But the term is used here as a synonym for compromise, rather than in the technical sense.

Sec. 130. Servant assaulting master.—

"*Gru.* Nay, 'tis no matter what he 'leges in Latin—if this be not a lawful cause for me to leave his service—Look you, sir,—he bid me knock him, and rap him soundly, sir; Well, was it fit for a servant to use his master so?"[4]

The rights and duties of domestics, or those menial employees who were lodged and fed in the house of the master, were well established by the common law of England.[5] The legal duty was imposed on the servant to defend the person of his master and an assault in the defense of the person of the master, was held justifiable, at common law, as this was deemed a part of his duty, for which he received his wages.[6] Instead of defending his master from an assault, as Grumio construed his directions in this instance, he was asked to himself assault his master, an act

---

like a lawyer would write, for the common courtesy of the profession is so much a part of the make-up of a lawyer and seems such a matter of fact that a lawyer would not be apt to remark it, or give such emphasis to the fact, as Shakespeare has.

[1] Taming of the Shrew, Act I, Scene II.
[2] Hawkins, Pl. Cr. 125.
[3] 1 Chitty, Crim. Law, 4.
[4] Taming of the Shrew, Act I, Scene II.
[5] 1 Bl. Comm. 324.
[6] 1 Bl. Comm. 429.

directly at variance with his legal duty, as a competent servant. This would have been inconsistent with the legal duty owing by him, under the English law, toward his master, hence, whatever the rule quoted in Latin, it was Grumio's contention that a direction to assault his master was a sufficient ground to leave his service, since such an assault would have caused him to violate the law.

Sec. 131. Punishment by pillory.—

"*Hor.* . . . And, with that word, she struck me on the head,
And through the instrument my pate made way;
And there I stood amazed for a while,
As on a pillory, looking through the lute."[1]

Katherine had so thrown the instrument over his head as to leave his head protruding through it, as one impaled in the pillory.

The pillory was an ancient instrument of torture and for the punishment of criminals, much used in England prior to 1837, when its use was discontinued. It consisted of a stout plank, fixed, like a sign board, on a pole, which was, in turn, supported by a wooden platform, from the ground. Another plank, parallel with the first was similarly arranged, on a hinge, with a large hole, for the neck of the culprit and two smaller holes for the hands, and the boards were so arranged that when the neck and hands of the criminal were inserted against the first board, the other was fastened against it, thus leaving the culprit imprisoned by his neck and wrists, where he was kept and subjected to various indignities, according to the gravity of his offense. By the statute of the pillory[2] (51 Hen. III, c. 6) the offenders liable to be subjected to such punishments were "forestallers, users of deceitful weights, perjurers, forgers," etc., and later libelers and publishers of books not submitted to the censorship of the king were

[1] Taming of the Shrew, Act II, Scene I.

[2] II Reeve's History Eng. Law, p. 302, *et seq.*

subjected to this punishment, among whom was a list of distinguished men, in England.

Sec. 132. Settlement by way of assurance.—

"*Bapt.* I must confess your offer is the best,
And, let your father make her the assurance.
She is your own."[1]

An assurance is a settlement, by written contract, in legal form, of property or business differences between the parties to the agreement, by the terms of which the one is assured of a complete right or title, as against the other.[2] Deeds of assurance were used to grant marriage portions and this is the way the term is applied in this connection.

Sec. 133. Chattels.—

"*Pet.* . . . I will be master of what is mine own:
She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my any-thing."[3]

A chattel, according to the English law, is any kind of property which, with reference either to the nature of the subject or the character of the interest possessed in it, was not a freehold. That class of property known as chattels, included not only movable property, but also all classes of property, which, though immovable, was not held under the feudal tenure.[4]

Any interest in land not amounting to a freehold, was held to be a chattel interest therein. But as between property thus savoring of the realty and mere personal movables, such as money, plate, cattle, or such like property, there was a natural distinction, so chattels were divided into chattels real and chattels personal. All character of chattels, at the old common law, were regarded as inferior

[1] Taming of the Shrew, Act II, Scene I.
[2] Bouvier's Law Dictionary.
[3] Taming of the Shrew, Act III, Scene II.
[4] Tiedeman, R. P. (3d ed.) Ch. 1.

to the kind of property known as real estate,[1] hence Petruchio calls Katharina his "chattel," to show his prowess, with reference to his ability to move her at his will, since by the law, the *situs* of personal property was held to accompany the person of the owner.

Sec. 134. Packing a witness.—

"*Gre.* Here's packing, with a witness to deceive us all."[2]

Packing is here used in the sense of a deception by false appearances; a counterfeit, or a delusion and the term is applied in law to the act of falsely organizing a jury to render a certain verdict.[3] In other words, a jury is said to be "packed" when men are qualified who falsely swear that they have no interest in the controversy or issue to be tried, after pledging themselves to return a verdict for one side or the other. The witness was falsely personating another, in the sense the term is used here and had agreed to give false testimony, or perjury, as the speaker intended.

---

[1] 2 Bl. Comm. 384.

In Henry V (Act II, Scene III) Pistol said to Hostess Quickly: "*Pist.* Come, lets away.—My love, give me thy lips; Look to my chattels and my movables." This shows the Poet's familiarity with the proper use of the term, for by the second noun, he not only used a synonym, but apparently did it to define the first one used.

On discovery of the duplicity of Cardinal Wolsey, King Henry issued a writ against him to forfeit all his "goods, lands, tenements, chattels and whatsoever," etc. (King Henry VIII, Act III, Scene II.)

[2] Taming of the Shrew, Act V, Scene I.

[3] Bacon, Abr., *Juries* (M.).

The Moor, Aaron, in Titus Andronicus, speaks of packing with Muliteus, for the exchange of children, as follows:

"*Aar.* . . Go pack with him, and give the mother gold,
And tell them both the circumstance of all."
(Act IV, Scene II.)

In Cymbeline, Cloten asks: "Who is here? What, are you packing, sirrah?" (Act III, Scene V.)

CHAPTER XIII.

"THE WINTER'S TALE."

Sec. 135. Time overthrows Law and Custom.
136. Trespass.
137. Negligence distinguished from wilfulness.
138. Prisoner's fees.
139. Not guilty.
140. King's prerogative.
141. Child born in prison.
142. Commitment to jail.
143. Arraignment of Hermione.
144. Surmises, not proof of guilt.
145. Indictment.
146. Torture by "boiling in oil".
147. Lawyer's points.
148. Arrested in the act, or, "Taken with the Manner."
149. Witchcraft and practice of magical arts.

Sec. 135. Time overthrows law and customs.—

"*Time, as Chorus.* Since it is in my power,
To o'erthrow law, and in one self-born hour
To plant and o'erwhelm custom."[1]

The coupling of law and custom, in this verse, shows the knowledge of the Poet of the origin of law, for the English common law was but the crystallization of those customs which had continued until they came to be recognized as law, by the courts.[2] Custom differs from prescription, in that the latter is personal and annexed to the owner of a particular estate, while a custom extends to all within the district where it obtains.[3] In order to establish a custom, such as would confer a right at law,

[1] Winter's Tale, Act IV, Scene I.

[2] Bacon, Abr., 1; 1 Bl. Comm. 76; 2 *idem.* 31.

[3] 2 Bl. Comm. 263.

Queen Margaret observes, in 3' Henry VI: "*Q. Mar.* Yet heavens are just and time suppresseth wrongs." (Act III, Scene III.)

it is necessary to show that it had existed for a time such that the "memory of man runneth not to the contrary thereof," and if the usage, in connection with the right claimed, had ceased for any length of time, the interruption of the custom would necessitate a new beginning, because it occurred within the "memory of man." Hence, it is that *Time* plays a very important part in the establishment of customs and laws, and it is consequently in the power of *Time* "To o'erthrow law and in one self-born hour, to plant and o'erwhelm custom."

Sec. 136. Trespass.—

"*Cam.* Be plainer with me; let me know my trespass
By its own visage: if I then deny it, 'tis none of mine."[1]

A trespass is any wrongful act or omission resulting in injury to the person or property of another.[2] The action of trespass lies as well for injuries to the person, as by an assault and battery,[3] as for an injury to the real estate of the injured person.[4] If the real estate was entered by force and arms, it was called, at the common law, trespass *vi et armis*, while a mere entry, without force, was called trespass *by breaking the close*.[5] However, the distinctions between the different kinds of trespass are not important here.

The speaker asks for the facts in connection with the charge of a wrongful act, on his part, not the mere conclusion as to such offense and he promises, if the facts stated are true, to admit them, or else he did not do the wrong charged against him.

---

[1] Winter's Tale, Act I, Scene II.
[2] 3 Bl. Comm. 208.
[3] 2 Aiken, (Vt.) 465.
[4] 3 Bl. Comm. 209.
[5] 1 Chitty, Pl. 439.

Mowbray, duke of Norfolk, thus refers to the father of his foe, in King Richard II (Act I, Scene I):

"*Nor.* . . . Once did I lay an ambush for your life,
A trespass that doth vex my grieved soul."

The Duchess of York thus addresses her husband:

"*Duch.* Why, York, what wilt thou do?
Wilt thou not hide the trespass of thine own?"
(King Richard II, Act V, Scene II.)

The Earl of Worcester, is quoted, in 1' Henry IV, as follows:

"*Wor.* . . . My nephew's trespass may be well forgot,
It hath the excuse of youth, and heat of blood."
(Act V, Scene II.)

The Duke of Exeter replied to the Dauphin of France: "*Exe.* . . caves and womby vaultages of France shall chide your trespass, and return your mock, in second accent of his ordnance." (Act II, Scene III.)

Clarence tells Warwick, in 3' Henry VI: "*Clar.* I am sorry for my trespass made." (Act V, Scene I.)

Speaking of the friendship between Cæsar and Antony, Menas said to Pompey, in Antony and Cleopatra:

"*Men.* I cannot hope,
Cæsar and Antony shall well greet together:
His wife, that's dead, did trespasses to Cæsar."
(Act II, Scene I.)

On the first meeting between Romeo and Juliet, she tells him, on being kissed: "Then have my lips the sin that they have took." And he replies: "Sin from my lips? O trespass sweetly urg'd: Give me my sin again." (Act I, Scene V.)

Before accomplishing her ruin, Tarquin is thus made to address Lucrece:

"And thou, the author of their obloquy
Shalt have thy trespass cited up in rhymes
And sung by children in succeeding times." (523, 525.)

And to this she is made to reply:

"Think but how vile a spectacle it were,
To view thy present trespass in another." (631, 632.)

Lucrece complained that:

"The illiterate, that know not how
To cipher what is writ in learned books,
Will quote my loathsome trespass in my looks." (810, 812.)

And the innocent Lucrece concluded that "few words would fit the trespass best." (1612.)

Sec. 137. Negligence distinguished from wilfullness.—

"*Cam.* . . . I may be negligent, foolish and fearful;
In every one of these no man is free,
But that his negligence, his folly, fear,
Amongst the infinite doings of the world,
Sometime puts forth: In your affairs, my lord,
If ever I were wilful—negligent,
It was my folly; if industriously
I played the fool, it was my negligence,
Not weighing well the end."[1]

The distinction noted here, between a mere negligent act and an act wilfully done, will be best appreciated by members of the legal profession. Simple negligence is a failure to use such care and caution as a reasonably prudent man would exercise under the circumstances, as a result of which another sustains an injury in his person or his property.[2] Wilfullness is a wrongful act, intentionally done, to the injury of another in his person or his property.[3] Because of the distinction between the two, and the absence of a wrongful act, intentionally done, in the former, there is a wide difference between the effect of the two, upon the liability of one charged with the effect of the wrongful act.

The Poet makes the speaker attempt to take away the element of willfulness from his intentional wrongful acts, by the plea that such acts resulted from mere weakness or levity, rather than from a wilfull intent to wrong, while his merely negligent acts were done, "not weighing well the end," which is a universal characteristic of simple negligence.

---

[1] Winter's Tale, Act I, Scene II.

[2] 1 Thompson on Negligence, Secs. 1, 15; 1 White, Per. Inj. on R. R. Chapter 1.

[3] 1 Thompson, on Negligence, Secs. 20-22; 1 White, Per. Inj. on R. R. Chapter 1.

Speaking of the lack of precaution before the battle of Bourdeaux, Talbot, in 1' Henry VI, said: "*Tal.* O, negligent and heedless discipline." (Act IV, Scene II.)

Commenting on his neglect in losing his inventory, which occasioned his undoing, Cardinal Wolsey, said, in King Henry VIII: "*Wol.* O negligence fit for a fool to fall by." (Act III, Scene II.)

Caesar tells Octavia, in Antony and Cleopatra:

"*Caes.* Your letters did withold our breaking forth;
Till we perceived, both how you were wrong led,
And we in negligent danger."

And Cleopatra uses this bit of philosophy, in talking to Antony:

"*Cleo.* Celerity is never more admir'd,
Than by the negligent." (Act III, Scenes VI, VII.)

In Cymbeline, a gentleman is made to say: "1 *Gent.* Howsoe'er 'tis strange, or that the negligence may well be laugh'd yet is it true, sir." (Act I, Scene I.)

Goneril tells the Steward, in King Lear: "Put on what weary negligence you please," etc. (Act I, Scene III.)

In Antony and Cleopatra, Augustus speaks of danger augmented by negligence, as follows:

"Your letters did withold our breaking forth
Till we perceiv'd both how you were wrong led
And we in negligent danger." (Act III, Scene VI.)

In Hamlet, Laertes, thus speaks of the death of his father, Polonius:

"To this point I stand,—That both the worlds I give to negligence,
Let come what comes; only I'll be reveng'd Most thoroughly for my father." (Act IV, Scene V.)

Before arousing Brabantio, Iago and Roderigo, in Othello, say:

"*Rod.* Here is her father's house; I'll call aloud.
Iago. Do; with like timorous accent and dire yell,
As when, by night and negligence, the fire
Is spied in populous cities." (Act I, Scene I.)

Speaking of how she acquired Desdemona's handkerchief, Emilia tells Iago, in Othello: "She let it drop by negligence; And, to the advantage, I, being here, took't up." (Act III, Scene III.)

In the CXVII' Sonnet, the Poet speaks thus of wilfullness and error:

"Book both my wilfullness and errors down,
And on just proof surmise accumulate." (9, 10.)

Sec. 138. Prisoner's fees.—

"*Her.* . . . Force me to keep you as a prisoner,
Not like a guest; so you shall pay your fees,
When you depart, and save your thanks."[1]

These lines unquestionably refer to the practice, not generally countenanced by the courts, on the part of jailers and such officers, of exacting fees from discharged prisoners, when they were discharged, regardless of their guilt or innocence. Of this procedure, in England, Lord Campbell says: "It may have been enforced until very recently, but could hardly be known to any except lawyers, or those who had been in prison, on criminal charges."[2]

Thus, the Poet makes Hermione refer to a piece of English procedure, not generally known to the laiety, and to enforce a longer visit from Polixenes, she threatens him, not only with imprisonment, but with the fees, on his discharge, that are usually exacted, on the liberation of prisoners.

Sec. 139. Not guilty.—

"*Pol.* . . . Had we pursued that life,
And our weak spirits ne'er been higher reared,
With stronger blood, we would have answered heaven,
Boldly, *Not guilty*."[3]

"Not guilty," is the plea made by a defendant, in a criminal case whenever he desires to place himself upon

---

[1] Winter's Tale, Act I, Scene II.

[2] Lord Campbell; Rolfe's Winter's Tale, p. 167, notes.

Discussing this practice, Mr. Reeves, in his History of English Law (vol. II, p. 416) observed: "It had been the practice for the common fines to be assessed promiscuously by the sheriffs, and, as the statute says, by barrators; and upon those who were innocent, as well as upon the guilty; all which was transacted after the justices were gone. These fines were paid to the sheriffs and barrators." (Reeve's History Eng. Law, vol. II, p. 416.)

[3] Winter's Tale, Act I, Scene II.

trial. Such a plea places upon the prosecution the burden of establishing, by competent proof, every fact essential to constitute the offense charged in the indictment or information.[1] As this plea raises the general issue, the defendant can put in evidence, under it, any fact which negatives the allegation of the indictment or information, as well as all matter of justification or excuse.[2]

Sec. 140. King's prerogative.—

"*Leon.* . . . Our prerogative calls not your counsels;
But our natural goodness imparts this."[3]

In Civil Law, a prerogative is the privilege or advantage which one person has over another, as where a person is invested with some office, he is held to be entitled to all the privileges or prerogatives belonging to that office.[4]

The royal prerogative, in English law, was the arbitrary power, vested in the King, to do good and not evil.[5] Under the law, the King in such matters as that here consid-

---

[1] 1 Bishop's Cr. Proc. Sec. 794.

[2] 1 Bishop's Cr. Proc. 1049; 2 *idem.* 669.

Aside from recognizing the correctness by which the issue of guilt or innocence is raised, in a legal way, this verse also notes that when innocence is based upon a free conscience, the plea is entered boldly, without fear of successful overthrow.

In pleading *not guilty* to the charge of treason and adultery, preferred against her, the good queen, Hermione, said: "*Her.* Since what I am to say, must be but that which contradicts my accusation; and the testimony on my part, no other but what comes from myself; it shall scarce boot me to say, *Not guilty.*" (Winter's Tale, Act III, Scene II.)

Speaking of Buckingham's trial for treason, in King Henry VIII, two gentlemen hold the following conversation: "2 *Gent.* Is he found guilty? 1 *Gent.* Yes, truly is he and condemn'd upon it." (Act II, Scene I.)

[3] Winter's Tale, Act II, Scene I.

[4] Bouvier's Law Dictionary.

[5] Bacon, Abr.; Chitty, Prerog.; Coke, Litt. 90.

ered, did not have to take the counsel of his courtiers, but was permitted to follow such promptings as his own conscience suggested, hence the truth of the verse, from a strictly legal standpoint: "Our prerogative calls not your counsels; But our natural goodness imparts this."

Sec. 141. Child born in prison.—

"*Paul.* You need not fear it sir;
The child was prisoner to the womb; and is,
By law and process of great nature, thence,
Freed and enfranchis'd: not a party to
The anger of the king; nor guilty of,
If any be, the trespass of the queen."[1]

This verse correctly states the common law of England as to the protection of an infant, from the punishment its mother is compelled to undergo. Lawful prisoners were those only who were charged with some crime and as an infant of tender years could not commit a crime, it could not lawfully be held a prisoner, because of a crime committed by the mother.[2]

Speaking of his prerogative, Charles, Dauphin of France, said, in 1' Henry VI:

"*Char.* . . Shall I, for lucre for the rest unvanquish'd,
Detract so much from that prerogative,
As to be call'd but viceroy of the whole?"
(Act V, Scene IV.)

In planning for Coriolanus' punishment, Sicinius tells Aedile: "*Sic.* . . if I say fine, cry *fine;* if death, cry *death;* Insisting on the old prerogative, And power i'the truth o' the cause." (Act III, Scene III.)

In King Lear, when accused of her intrigue and crimes with Edmund, Goneril does not deny it, but replies: "Say, if I do; the laws are mine, not thine; Who shall arraign me for it?" (Act V, Scene III.) And as the King or Queen, could, in law, do no harm, the question, from a strictly legal standpoint, was proper, since no one could accuse the queen, or arraign her for such an offense.

[1] Winter's Tale, Act II, Scene II.

[2] 6 Toullier, 82, 83.

It was the practice, established by the ancient cases in the Year Books, on the sentencing of a woman, to always ask if she had anything to allege why the execution of the sentence ought to be stayed. If she replied that she was "quick with child" a jury of matrons were summoned to try this issue and if they found in the affirmative, the sentence was stayed until the birth of the infant.[1] But a sentence was not stayed for pregnancy, except in capital cases and at common law, then only when the woman was with "quick child," as the common law did not regard it a crime to destroy a child that had not quickened.[2]

Paulina was therefore right and the infant Princess was thence, "By law and process of great nature" free'd and enfranchis'd," "Nor guilty of, if any be, the trespass of the queen."

---

[1] 1 Chitty, Cr. Law, 760; 1 Bishop's Cr. Proc. Sec. 1323.

[2] 3 Inst. 17; 4 Bl. Comm. 395; 1 Hale, P. C. 369.

And not only was the death of an unborn child that had not quickened regarded as no offense at common law, but a second pregnancy was held to be no bar to an execution of a pregnant woman. 2. Hawk P. C. c. 51, Sec. 10. But by statute, in most of the States in the United States, killing an unborn child, before it quickens, is held to be a crime and of course this absurd rule which denied a second child the benefit of its life because of the crime of its mother, would not obtain at the present day. 4 Bl. Comm. 395; Chitty, Cr. Law, 760; 1 Bishop, Cr. Proc. Sec. 1323.

In an early South Carolina case, a plea of pregnancy was urged and after a trial of this issue, by a jury of matrons, the execution of the prisoner was stayed. State vs. Arden, 1 Bay, 487, 490.

As reported by the old cases, although according to strict law, the pregnancy with child that had not quickened, was no legal excuse to the execution of a female prisoner, the fact of a quick child was generally found to exist, by the jury of matrons, "because the gentleness of their sex generally inclined them" to find the affirmative, to prevent the death of the child, in any event. 2 Hale, P. C. 413.

It seems strange that it took the medical profession until the last century to conclude that unless the child was dead, before it quickened, it was alive, but regarded the foetus as dead until the motion was felt by the mother. And that until the past few

Sec. 142. Commitment to jail.—

"*Paulina.* Unless he take the course that you have done,
Commit me for committing honour, trust it,
He shall not rule me."[1]

A commitment, in law, is a writ, issued under or by virtue of an order or rule of a court or justice, for the imprisonment of the prisoner named in the writ[2] Commitments are either before conviction, or after trial and conviction is had of the offender named in the writ, by some court having jurisdiction of his crime.[3]

Paulina, in these lines, plainly gives the King to understand that she will not be lawfully committed, unless it is lawful to do so, as he had done with Hermione, commit her to jail for acting honorably. And in this she was right, for until lawful trial and conviction, she could not be committed.[4]

Sec. 143. Arraignment of Hermione.—

"*Offi.* Hermione, queen of the worthy Leontes, king of Sicilia, thou art here accused and arraigned of high treason, in committing adultery with Polixenes, king of Bohemia; and conspiring with Camillo, to take away the life of our sovereign lord the king, thy royal husband; the pretence whereof, being by circumstances partly laid open, thou, Hermione contrary to the faith and allegiance of a true subject, did'st counsel and aid them, for their better safety, to fly away by night."[5]

While sufficient for the purposes of the Poet, to impress the laity with the solemnity of a criminal charge against

---

years the legal profession held to this absurd idea and permitted the death of unquick children, without punishing the party responsible for such murder. Bishop, Stat. Crimes, Secs. 744-746; 1 Hale, 433; Sherwood's Cr. Law, 13.

[1] Winter's Tale, Act II, Scene III.

[2] Bouvier's Law Dictionary.

[3] Sherwood's Criminal Law.

[4] II Reeve's History Eng. Law, p. 418.

[5] Winter's Tale, Act III, Scene II.

the poor queen, this charge, of course, lacks all the essentials of a valid legal charge or indictment against Hermione. Indeed, the words, "arraigned," "adultery" and "treason," with the conclusion of the charge, "contrary," etc., are the only legal forms adopted in this entire charge.

It is always essential, in a criminal charge, to frame the offense charged with sufficient definiteness and description of the crime, with a statement of the facts by which it was committed, as to thoroughly identify the accusation, and the time and place of the commission of the crime, and after setting forth these essentials, there are certain terms of art used, which are adopted in most indictments.[1] The commencement and conclusion of this charge, however, is similar to that followed in formal criminal charges, and the use of the legal term "arraign," is likewise proper, for in all criminal cases, the accused is called before the bar of the court, in his or her proper name; the charge is read and the plea of guilty or "not guilty," is taken and this, in law, is called the "arraignment."[2]

Sec. 144. Surmises, not proof of guilt.—

"*Her.* . . . No, life, I prize it not a straw:
But for mine honour, (which I would free)
If I shall be condemned, upon surmises,
All proofs sleeping else, but what your jealousies awake,
I tell you, 'tis rigour and not law."[3]

Legal evidence consists of those facts within the knowledge of the witnesses called, legally submitted, upon the issues in dispute, as distinguished from all comments,

[1] Bacon, Abr., Indictment, (G1); 1 Chitty, Cr. Law, 217, 224; 297.

[2] Archbold, Cr. Pl. (14th ed.) 129; 1 Leach, Cr. Cas. (4th ed.) 102; Carrington, Cr. Law, 57; 6 Cox, Cr. Cas. 386.

[3] Winter's Tale, Act III, Scene II.

arguments or "surmises" as to facts not within the knowledge of the witnesses who testify in the given cause.[1] Hearsay, or "surmises," not of what the witness knows himself, but what he has heard from others, is never admitted in controversies in a legally constituted court, where any attention is paid to the rules of evidence.[2]

Hence, Hermione was entitled to demand direct and primary evidence of her guilt, instead of such incompetent evidence and she but proclaimed the law when she said: "If I shall be condemned, upon surmises, all proofs sleeping else," . . . "I tell you, 'tis rigour and not law."

Sec. 145. Indictment.—

"*Leon.* Read the indictment."[3]

An indictment is a written accusation against one or more persons, of a crime or misdemeanor, presented to and preferred upon the oath or affirmation of a grand jury, legally convoked.[4] The term is used here as a synonym for information, which is a charge of crime, preferred by a public prosecutor, as distinguished from such a charge, preferred by a grand jury, regularly impanelled and sworn.[5]

An accusation made by the crown and found to be true by a grand jury, furnished the basis for a regular indictment,[6] but all the essentials of the offense, with such certainty as to inform the accused of the nature and cause of the accusation, were required to be set forth in such a formal charge.[7]

The reading of the indictment, in practice, to the de-

---

[1] 1 Greenl. Evidence, ch. 1; 1 Starkie, Evid., part 1, sec. 1.

[2] 1 Starkie, Evid., pt. 1, p. 44; 1 Phillipps, Evid. 185.

[3] Winter's Tale, Act III, Scene II.

[4] Bacon, Abr., 4 Bl. Comm. 299; Coke, Litt. 126.

[5] 4 Bl. Comm. 308.

[6] 1 Chitty, Cr. Law, 168; Comyns, Dig.; Bacon, Abr., *Indictment.*

[7] Bacon, Abr., *Indictment*, (G2); Hawkins, Pl. Cr. b. 2, c. 25, sec. 71.

fendant, is a part of the formal arraignment of the prisoner, hence it is customary, as the Poet had the king order, in this trial, to "read the indictment."[1]

Sec. 146. Torture by boiling in oil.—

"*Paul.* What studied torments, tyrant, hast for me?
What wheels? racks? fires? What flaying? boiling,
In leads, or oils? what old, or newer torture
Must I receive; whose every word deserves
To taste of thy most worst?"[2]

This reference is clearly to a unique and barbarous statute of the time of Henry VIII,[3] inspired by the crime of one Richard Roose, of whose crime and the statute that it caused to be enacted, Reeves observes: "Having put some poison into a vessel of yeast, in the Bishop of Rochester's kitchen, by means of which seventeen persons in the bishop's family and several others were poisoned, this very heinous offence raised a kind of indignation in the legislature; and it was declared by that act, that the said poisoning should be adjudged high treason, and that Richard Roose should be attainted accordingly, by authority of parliament and should be boiled to death; and, as if none would commit this offence but such as were of the same employment with the present offender, it was enacted, not only that henceforth every willful murder by poisoning should be high treason, but that such offenders should all be boiled to death."[4]

---

[1] 1 Bl. Comm. 33; Archbold, Cr. Pl. 128.

Falstaff is made to say to Hostess Quickley, in 2' Henry IV (Act II, Scene IV): "*Fal.* Marry, there is another indictment upon thee, for suffering flesh to be eathen in thy house, contrary to the law; for the which, I think, thou wilt howl."

In King Richard III, the Scrivener is made to say: "*Scriv.* Here is the indictment of the good lord Hastings." (Act III, Scene IV.)

[2] Winter's Tale, Act III, Scene II.

[3] 22 Henry VIII, c. 9.

[4] IV Reeve's History Eng. Law, p. 427.

Sec. 147. Lawyer's points.—

"*Serv.* He hath ribands of all the colours i'the rainbow; points, more than all the lawyers in Bohemia can learnedly handle, though they come to him by the gross."[1]

The "points," in a lawsuit are the legal propositions or questions, arising in the trial of a case.[2] It is very generally held to be the duty of the Judge to give an opinion on all the "points" of law brought to his attention, by counsel, in the trial of a lawsuit, although the opinion on some may be reserved, for investigation, until after the trial of the cause.[3] In the printing and submission of briefs, and written arguments, it is customary to submit first, "the points," then the authorities to sustain the different propositions urged and diligent counsel are apt to urge all the "points" that either directly or collaterally pertain to the rights of their clients.

Sec. 148. Arrested in the act, or, "taken with the manner."—

"*Clown.* Your worship had like to have given us one, if you had not taken yourself with the manner."[4]

The Clown here refers to the old legal expression of being arrested in the act, caught with the stolen article in the thief's possession, or "taken with the manner." Speaking of crimes in which the criminal was "taken with the manner," Bracton and Britton said that in such cases the crime was *factum manifestum*,[5] and Lord Coke commenting upon this observation said that the criminal was not to be admitted to bail.[6]

---

[1] Winter's Tale, Act IV, Scene III.

[2] Bouvier's Law Dictionary.

[3] Bouvier's Law Dictionary.

[4] Winter's Tale, Act IV, Scene IV.

[5] Bracton, lib. iii, fol. 12; Britton, fol. 22.

[6] Coke, 2 Inst. 189. And see also II Reeve's History Eng. Law, p. 418.

Sec. 149. Witchcraft and practice of magical arts.—

"*Paul.* It is requir'd
You do awake your faith. Then all stand still;
Or those that think it is unlawful business
I am about, let them depart."[1]

As observed by Doctor Rolfe,[2] this reference is clearly to the statutes against witchcraft and the practice of magical arts, passed during the reign of Elizabeth and at other times in England.

It was enacted by 5' Elizabeth, c. 16, that anyone guilty of practicing witchcraft, or enchantments, or using or practicing any invocation or conjuration of evil and wicked spirits, charm or sorcery, whereby anyone shall happen to be killed or destroyed, or wasted, consumed, or lamed, in body or member, it shall be felony without clergy, and such offender shall be imprisoned for a year and stand in the pillory once a quarter, for that time, for six hours.[3]

---

[1] Winter's Tale, Act V, Scene III.

[2] Rolfe's Winter's Tale, p. 264, notes.

[3] V Reeve's History Eng. Law, p. 349.

The belief in witchcraft, which crystallized into different statutes, during the lifetime of the Poet, was so general that Shakespeare has many references to it. In Pericles, Prince of Tyre, Simonides is made to say to the Prince: "Thou hast bewitch'd my daughter and thou art a villain." (Act II, Scene V.)

During the reign of William and Mary, in 1692, one Bridgett Bishop was executed for witchcraft, and following is copy of the warrant and of the return by the Sheriff of Salem, Massachusetts:

"To George Corwin Gent'n, High Sheriffe of the County of Essex
Greeting

WHEREAS Bridgett Bishop al's Oliver, the wife of Edward Bishop of Salem in the County of Essex Lawyer at a speciall Court of Oyer and Terminer held at Salem the second Day of this instant month of June for the Countyes of Essex Middlesex and Suffolk before William Stoughton Esqe. and his associates of the said Court was Indicted and arraigned upon five several Indictments for using practising and exercising on the * * *

last past and divers other dayes and times the felonies of Witchcraft in and upon the bodyes of Abigail Williams, Ann Putnam * * * Mercy Lewis, Mary Walcott and Elizabeth Hubbard of Salem Village * * * single women; whereby their bodyes were hurt, afflicted, pined consumed and tormented contrary to the forme of the statute in that case made and provided. To which Indictm'ts the said Bridgett Bishop pleaded not guilty and for Tryall thereof put herselfe upon God and her Country whereupon she was found guilty of the Felonyes and Witchcrafts whereof she stood indicted and sentence of Death accordingly passed ag't her as the Law directs. Execution whereof yet remaines to be done. These are therefore in the names of their maj'ties William and Mary now King and Queen over England &c. to will and comand you That upon Fryday next being the Tenth Day of this instant month of June between the hours of eight and twelve in the afornoon of the same day you safely conduct the s'd Bridgett Bishop al's Olliver from their maj'ties Gaol in Salem afores'd to the place of execution and there cause her to be hanged by the neck until she be dead and of your doings herein make returne to the clerk of the s'd Court and of this pr'cept. And hereof you are not to faile at your peril. And this shall be your sufficient warrant Given under my hand & seal at Boston the eighth of June in the fourth year of the reigne of our Sovereign Lords William and Mary now King and Queen over England &c., Annoq'e Dom. 1692.

WM. STOUGHTON."

"June 10th, 1692.

According to the within written precept I have taken the body of the within named Brigett Bishop out of their majesties goal in Salem and safely conveighd her to the place provided for her execution and caused y sd Brigett to be hanged by the neck untill she was dead all which was according to the time within required and so I make returne by me.

GEORGE CORWIN,
Sheriff."

(See "Comment," a Legal Publication, by Co-Op. Pub. Co., for May, 1910, p. 229, for fac-simile of original warrant and return.)

CHAPTER XIV.

"COMEDY OF ERRORS."

Sec. 150. Earnest to bind bargain.
151. Attachment.
152. Arrest.
153. Breach of Promise.
154. Arrest upon *mesne* process—Debtor's dungeon.
155. Action "on the case."
156. Subornation.
157. Prisoner.

Sec. 150. Earnest to bind bargain.—

"*Dromio of S.* Hold, sir, for God's sake: now your jest is earnest.
Upon what bargain do you give it me?"[1]

Earnest, or Arles, as it is called, in Scotland, from the civil law word *arrhae,* is a small sum of money which is given in proof of the existence of the mutual consent, necessary to constitute a binding contract.[2] It is not the earnest which makes the contract legal, but the mutual consent, evidenced by the earnest, which is the basis of the bargain. The earnest is only some evidence of the legality of the contract and it may be preserved by an instrument of writing, or other evidence, in case the earnest is dispensed with. The original view of earnest, by the common law of England, was that it was a small portion of the price, in token of the conclusion of the contract,[3] and this view seems to prevail to the present day, so that the earnest paid is entitled to be credited on the contract price, as a part payment, however small it may have been.[4]

[1] Comedy of Errors, Act II, Scene II.
[2] Lawson, Contracts (3d ed.)
[3] Coke, Inst., b. iii, tit. iii, s. 5; Story, on Sales, p. 216.
[4] *Ante idem.*

Sec. 151. Attachment.—

"*Mer.* You know, since Pentacost, the sum is due,
And since I have not much importun'd you;
Nor now I had not, but that I am bound
To Persia, and want guilders for my voyage;
Therefore, make present satisfaction,
Or I'll attach you by this officer."[1]

To attach is to take into the custody of the law the person or property of one already before the court, or of one it is sought to bring before the court. The writ is in the nature of a criminal process and issues from a court of record to a Sheriff or other officer commanding him to bring the person named in the writ before the court.[2]

Of course at the time of Shakespeare, in England, the law permitted the creditor to obtain a writ for the imprisonment of his insolvent debtor[3] and this law continued in effect in the United States, until the different states abolished same by special statutes and organic law.[4]

In Two Gentlemen of Verona, the following occurs:

"*Speed.* No believing you, indeed sir. But did you perceive her earnest?

Valentine. She gave me none, except an angry word." (Act II, Scene I.)

Lear is made to say, to Kent, in King Lear:

"Now, my friendly knave, I thank thee.
There's earnest of thy service." (Act I, Scene IV.)

Boult is made to say, in Pericles, Prince of Tyre: "Master, I have gone through, for this piece, you see. If you like her, so; if not, I have lost my earnest." (Act IV, Scene II.)

[1] Comedy of Errors, Act IV, Scene I.

[2] 3 Bl. Comm. 280; 4 *idem.* 283; Strange, 441.

[3] It has been claimed that prior to the statute of Hen. III, the debtor could not be arrested at common law, for failure to discharge his debt (Sir Wm. Herbert's case, 3 Co. 11; Palgrave's Rise and Prog. of Eng. Com., book 1, p. 181), but this is denied by Bracton and Reeves. Bracton, 440, 441; II Reeve's Hist. Eng. Law, pp. 439, 440.

[4] Imprisonment for debt, was abolished by statute in N. Y. Apr. 26th, 1831; in Massachusetts, in 1834; in Pennsylvania, 1835; in Mississippi, in 1839, and in Tennessee, in 1840.

Hence, at the time this play was written, it was within the power of a merchant to arrest his debtor, for a failure to satisfy a debt, admitted to be due and the attachment by an officer was the legal process adopted for the purpose.[1]

Sec. 152. Arrest.—

"*Ang.* Here is thy fee; arrest him officer;
I would not spare my brother in this case,
If he should scorn me so apparently.
Off. I do arrest you, sir; you hear the suit."[2]

To make an arrest is to deprive a person of his liberty, by legal authority; to seize him and detain him in the custody of the law.[3] At the time this play was written

[1] 2 Kent's Comm. (12th ed.) 397.

In Comedy of Errors (Act IV, Scene I) Angelo said to Antipholus: "*Ang.* This touches me in reputation: Either consent to pay this sum for me, or I attach you by this officer."

And Antipholus said to the Officer: "*Ant.* That I should be attached in Ephesus: I tell you, 'twill sound harshly in her ears." (Comedy of Errors, Act IV, Scene IV.)

In King Richard II, York said to Bolingbroke:

"*York.* . . But, if I could, by him that gave me life,
I would attach you all and make you stoop
Unto the sovereign mercy of the king." (Act II, Scene II.)

Before arresting Buckingham, in King Henry VIII, Brandon said: "*Bran.* Here is a warrant from the king to attach Lord Montacute." (Act I, Scene I.)

Sicinius attempts to arrest Coriolanus, with this language: "*Sic.* Go, call the people; (Exit Brutus.) in whose name, myself, attach thee, as a traitrous innovator, a foe to the public weal." (Act III, Scene I.)

Paris tells Romeo, on attempting his arrest for despoiling the grave of the Capulets:

"I do defy thy conjurations,
And do attach thee as a felon here." (Act V, Scene III.)

The Watch, in Romeo and Juliet, gives direction: "Go, some of you, Whoe'er you find, attach." (Act V, Scene III.)

[2] Comedy of Errors, Act IV, Scene I.

[3] Bouvier's Law Dictionary.

it was one of the remedies furnished the creditor, against his debtor, whereby his person was taken and held as security for the payment of the debt due.[1]

Arrest and attachment are used interchangeably, but in strictness an arrest is the act resulting from the service of an attachment, and while an attachment applies as well to the taking of property, an arrest is used only in speaking of the seizure of persons.[2]

Sec. 153. Breach of promise.—

"*Ant. E.* Good lord, you use this dalliance to excuse,
Your breach of promise to the Porcupine."[3]

[1] Reeve's History, Eng. Law, pp. 439, 440; Bracton, 440.

[2] Bouvier's Law Dictionary.

The Merchant directs the officer to arrest Angelo, in Comedy of Errors, as follows: "*Mer.* Well, officer, arrest him, at my suit. *Off.* I do; and charge you, in the Duke's name, to obey me." (Act IV, Scene I.)

Westmoreland arrests Archbishop of York, Hastings and Mowbray, in 2' Henry IV (Act IV, Scene II) with this speech: "*West.* Good tidings, my lord Hastings; for the which, I do arrest thee, traitor, of high treason: And you, lord archbishop—and you, lord Mowbray, of capital treason I attach you both."

The following occurs in the arrest of Falstaff, at the suit of the hostess, in 2' Henry IV (Act II, Scene I): "*Fang.* Snare, we must arrest sir John Falstaff.

Host. Yes, good master Snare; I have entered him and all." . . . . . .

"*Fang.* Sir John, I arrest you at the suit of mistress Quickly."

After denunciation of the traitors, in King Henry V, they were all ordered arrested and were taken into custody as follows: "*K. Hen.* . . Arrest them to the answer of the law and God acquit them of their practices. *Exe.* I arrest thee of high treason, by the name of Richard, earl of Cambridge.

I arrest thee of high treason, by the name of Henry, lord Scroop of Masham.

I arrest thee of high treason, by the name of Thomas Grey, knight of Northumberland." (Act II, Scene II.)

[3] Comedy of Errors, Act IV, Scene I.

A breach of promise is the violation or failure to perform some obligation, engagement or duty, assumed by the party so failing.[1] The words are not used in this verse in their technical legal sense, but rather in the sense that a mere engagement upon which no legal action could be maintained, was broken.

Sec. 154. Arrest upon mesne process—Debtor's dungeon.—

"*Dromio of S.* No, he's in Tartar limbo, worse than hell.
A devil in an everlasting garment hath him;
One whose hard heart is button'd up with steel;
A fiend, a fairy, pitiless and rough;
A wolf, nay, worse, a fellow all in buff;
A back-friend, a shoulder-clapper, one that countermands
The passages of alleys, creeks, and narrow lands;
A hound that runs counter and yet draws dry foot well;
One that before the judgment carries poor souls to hell."[2]

Dromio means to convey the idea that the arrest has been made by an officer, upon *mesne process*,[3] before final judgment or trial, and he will be placed in a debtor's dungeon, which was meant by the cant term, "hell."[4] By the terms "back-friend" and "shoulder-clapper," he means an officer who approaches from the rear of the person arrested,[5] and places him under arrest by clapping his hand upon his shoulder and so advising him. This is the usual manner of making an arrest and the person is just as much deprived of his liberty, when so address't, as

[1] Comyns Did., C. 45-49.

[2] Comedy of Errors, Act IV, Scene II.

[3] Bouvier's Law Dictionary.

[4] There was a place under the Exchequer Chamber, where the King's debtors were confined, called "hell" and also a place in Wood's street, given this name, as established by certain old publications, cited by Doctor Rolfe, in Comedy of Errors, p. 161, notes.

[5] Rolfe's Comedy of Errors, p. 161, notes.

if he had been locked up in prison, for he is denied his right of locomotion.[1]

Sec. 155. Action "on the case."—

"*Adriana.* Why, man, what is the matter?
Dromio of S. I do not know the matter; he is 'rested on the case."[2]

An action on the case is a cause of action for an injury done by some tort, or wrongful act of the party causing the injury, although the injury was not the direct result of the wrong intended, as where one negligently leaves an obstruction in a street or pass-way and the obstruction causes an injury, the injured one could sue in an action on the case."[3] Of course Dromio gets the legal terms mixed, in this instance, for as Antipholus was arrested in an action of debt, or on a contract, it was not an "action on the case" at all, but for the breach of an obligation assumed by a contract or upon an implied assumpsit to pay the reasonable value for the chain, which would be an entirely different kind of an action, in law.[4]

Sec. 156. Subornation.—

"*Ant. E.* Thou hast suborn'd the goldsmith to arrest me."[5]

Suborn is to procure privately or secretly, as where one is incited to perform a criminal or bad action, by bribe or persuasion.[6]

---

[1] Newell on Mal. Pros. and False Arrest.

[2] Comedy of Errors, Act IV, Scene II.

[3] Cooley's Torts.

[4] Lawson's Contracts (3d ed.).

Speaking of the action of *trespass upon the case*, during the reigns of Henry VI and Edward IV, Reeves observes, in his History of English Law: "The action most favored was that of *trespass upon the case*, which, during these two reigns, expended itself in a manner that made it applicable to numberless cases for which the common law had not before provided any remedy." III Reeve's History Eng. Law, p. 559.

[5] Comedy of Errors, Act IV, Scene IV.

[6] Bouvier's Law Dictionary.

In law, when one is procured to take a false oath, he is said to have been "suborned" to commit perjury and the one who so procures him to falsely testify is said to be guilty of subornation of perjury.[1]

[1] 2 Chitty, Cr. Law, 317.

In Macbeth, Macduff is made to say: "They were suborn'd:
Malcolm and Donalbain, the king's two sons,
Are stolen away and fled; which puts upon them
Suspicion of the deed." (Macbeth, Act II, Scene IV.)

In 1' Henry IV, Hotspur is made to say, to Northumberland: "*Hot.* But shall it be that you,—that set the crown upon the head of this forgetful man; and, for his sake, wear the detested blot of murd'rous subornation." (Act I, Scene III.)

In 2' Henry IV (Act IV, Scene I) Westmoreland thus addresses the archbishop of York:

"*West.* When ever was your appeal denied?
Wherein have you been gall'd by the king?
What peer hath been suborn'd to grate on you?"

The Poet makes Joan of Arc say to the Shepard, in 1' Henry VI:

"*Puc.* Peasant avaunt; you have suborn'd this man,
Of purpose to obscure my noble birth." (Act V, Scene IV.)

Suffolk thus pleads against the good Gloster, in 2' Henry VI: "*Suff.* . . Hath he not twit our sovereign lady here, With ignominious words, though clerkly couched, As if she had suborned some to swear, false accusations to o'erthrow his state." (Act III, Scene I.)

Gloster tells King Henry VI: "*Glo.* . . Foul subornation is predominant and equity exil'd your highness' land." (2' Henry VI, Act III, Scene I.)

Attempting to make Gloster responsible for the treason of his wife, Suffolk, in 2' Henry VI, said: "*Suff.* . . The duchess, by his subornation, upon my life, began her devilish practices." (Act III, Scene I.)

Tyrell, in King Richard III, refers to Dighton and Forrest, "Whom I did suborn to do this piece of ruthless butchery." (Act IV, Scene III.)

In speaking of her husband, Othello, to Emilia, Desdemona is made to say:

"*Des.* Beshrew me much, Emilia,
I was, (unhandsome warrior as I am,)
Arraigning his unkindness with my soul;
But now, I find, I had suborn'd the witness,
And he's indited falsely." (Act III, Scene IV.)

Sec. 157. Prisoner.—

"*Off.* He is my prisoner; if I let him go,
The debt he owes will be required of me."[1]

A prisoner is one held in confinement against his will.[2] Lawful prisoners are those charged with crime, or a civil liability.[3] The prisoner in this instance was of the latter kind and being arrested on original process he was entitled to his liberty, only on proper bail being provided for the payment of the debt and if the officer granted him his freedom, it would be upon this condition, with himself as surety for the debt.[4]

The wronged Lucrece complains at Opportunity:

"Guilty thou art of murder and of theft,
Guilty of perjury and subornation,
Guilty of treason, forgery and shift,
Guilty of incest, that abomination;
An accessory by thine inclination
To all sins past and all that are to come,
From the creation to the general doom." (918, 924.)

Defying Time and Jealousy, the Poet tells his friend, in the CXXV' Sonnet:

"Hence, thou suborn'd informer: a true soul
When most impeach'd stands least in thy control." (13, 14.)

[1] Comedy of Errors, Act IV, Scene IV.
[2] Bouvier's Law Dictionary.
[3] 6 Toullier, 82.
[4] 1 Salk. 402; II Reeve's History Eng. Law, 439, 440.

After his arrest, on the attempt to over-power him, Antipholus said to the Officer: "*Ant.* What, will you murder me? Thou gaoler, thou, I am thy prisoner; wilt thou suffer them to make a rescue? *Off.* Masters, let him go; He is my prisoner and you shall not have him." (Comedy of Errors, Act IV, Scene IV.)

In 1' Henry IV, King Henry thus addressed Hotspur: "*K. Hen.* . . Send me your prisoners, with the speediest means, or you shall hear in such a kind from me, as will displease you." (Act I, Scene III.)

CHAPTER XV.

"MACBETH."

Sec. 158. Estate.
159. Execution.
160. Instigation of Macbeth's crime.
161. Agent.
162. Trust, from fiduciary relation.
163. Murder.
164. Malice.
165. Copyhold.
166. Single ownership.

Sec. 158. Estate.—

"*Dun.* And you whose places are the nearest, know,
We will establish our estate upon
Our eldest Malcolm, whom we name hereafter,
The prince of Cumberland."[1]

Estate is the condition and relation which an owner bears toward his property of any description.[2] It particularly includes inheritances and such properties that can be devised and hence, the king, here, uses the term, as embracing his earthly acquisitions, which he devolves upon the eldest son, where the law of England placed his property rights.[3]

---

[1] Macbeth, Act I, Scene IV.

[2] Coke, Litt., secs. 345, 650.

[3] Bouvier's Law Dictionary, Primogeniture.

In the more extensive use of the word, it signifies everything of which riches may consist—and this is the sense in which it is used here—and in the technical sense, it indicates the degree or nature of one's ownership in land.

In As You Like It (Act I, Scene I) Rosalind said:

"*Ros.* Well, I will forget the condition of my estate, to rejoice in yours."

Lord Abergavenny, in King Henry VIII, speaking of the pageant

Sec. 159. Execution.

"*Dun.* Is execution done on Cawdor? Are not those in commission yet returned?"[1]

Execution, in law, is putting the sentence of the law into force.[2] A commission was a body of persons authorized to act in some certain manner.[3] In the broader sense, execution is the accomplishment of a thing; or the completion of an undertaking or an instrument. And in criminal law, it is the putting of a convict to death, agreeable to law, in pursuance of his sentence.[4]

---

that ratified the French treaty, said: "*Aber.* I do know kinsmen of mine, three at least, that have by this so sicken'd their estates, that never they shall abound as formerly." (Act I, Scene I.)

A stranger says of Timon of Athens, in referring to his financial embarrassments: "1 *Strang.* Now lord Timon's happy hours are done and past and his estate shrinks from him." (Act III, Scene I.)

Menenius said to Virgilia, in Coriolanus: "*Men.* A letter for me? It gives me an estate of seven years' health; in which time I will make a lip at the physician." (Act II, Scene I.)

Cleopatra tells Cæsar, in Antony and Cleopatra:

"*Cleo.* See, Cæsar, O, behold,
How pomp is follow'd; mine will now be yours;
And, should we shift estates, yours would be mine."
(Act V, Scene II.)

In Cymbeline, Iachimo said to Posthumus, on making the wager: "*Iach.* Would I had put my estate, and my neighbour's, on the approbation of what I have spoke." (Act I, Scene IV.)

The King tells Rosencrantz and Guildenstern, in Hamlet, on speaking of the dangerous nature of Hamlet's affection: "*King.* . . . . The terms of our estate may not endure Hazard so near us, as doth hourly grow Out of his lunes." (Act III, Scene III.)

[1] Macbeth, Act I, Scene IV.
[2] 3 Bl. Comm. 412.
[3] 5 Barnew. & C. 850.
[4] 4 Bl. Comm. 403.

Sec. 160. Instigation of Macbeth's crime.—

"*Macb.* My dearest love, Duncan comes here to-night.
Lady M. And when goes hence?
Macb. To-morrow—as he purposes.
Lady M. O, never shall sun, that morrow see:
Your face, my thane, is as a book, where men
May read strange matters:—To beguile the time,
Look like the time; bear welcome in your eye,
Your hand, your tongue: look like the innocent flower,
But be the serpent under it. He that's coming
Must be provided for: and you shall put
This night's great business into my despatch;
Which shall to all our nights and days to come
Give solely sovereign sway and masterdom."[1]

In commenting upon this element in the crime, resulting from the interference and influence of Lady Macbeth, upon the doubt and indecision of Macbeth, as evidenced by the above verse, August Goll, the Danish criminologist, observes: "When two wills have thus been made to flow in unison, a phenomenon arises to which the Italian criminologists first directed attention: there is thus produced not only the sum by addition, not merely the quantitatively increased force which the unity gives, but also, as a chemical process, an entirely new product, qualitatively different from the factors which made it, possessing powers and qualities which neither of those factors separately possessed. . . . . Thus, two children, neither of whom, to save his life, would dare to walk through a long dark passage alone, will venture to pass it hand in hand, each encouraging the other by the aid of his fear of showing lack of courage. In like manner two criminals will combine to carry out crimes so atrocious that neither of them can quite realize afterwards how he came to commit them. Nor, indeed, is it one of them singly who commits them, but the co-operative

[1] Macbeth, Act I, Scene V.

psychic unity in which each of them has merged himself."[1]

Sec. 161. Agent.—

"*Macb.* I am settled and bend up each corporal agent to this terrible feat."[2]

---

[1] Goll's Criminal Types in Shakespeare, (Mrs. Weeks tr.) pp. 97-99.

Discussing Macbeth's acquiescence in the criminal intent of his wife, August Goll, in his Criminal Types in Shakespeare, further adverts to the words, spoken in reply to his wife's suggestion, wherein he said,

"We will speak further,"

as follows: "Macbeth's freedom of action is vanishing: the words are, this time, perfectly in tune with Lady Macbeth's guilty speech; it is only his own duplicity which, though badly enough, still makes the reservation possible: this must be further discussed; but the reservation is now quite subjective, it exists only in Macbeth's own mind; it is there he reserves the right to weigh the case once more. From Lady Macbeth's point of view the speech must be understood as a veiled promise. The crime is coming into existence." (Goll's Criminal Types in Shakespeare, p. 109.)

And commenting further on this skillful portrayal of the instigation of the murder, Goll observes: "Less eminent psychologists than Shakespeare would probably have made Lady Macbeth try to refute Macbeth's counter reasons in a logical duel, following the complete explanation of them to her. . . Lady Macbeth does not need to hear Macbeth's reasons against; she knows them all beforehand, because she knows him and is able to follow his thoughts, which are all merely deductions from his own fundamentally-honest and socially-minded self. That is the reason she does not enter into them. She goes behind them all, directs her attack straight against this self, tries to touch the chord which lies deepest in Macbeth's heart, to make it beat in time with her own purpose." (Pages 112, 113.)

Lady Macbeth's pride and admiration for her husband and her desire to see him the ruler of the kingdom, is treated by Magistrate Goll as the all powerful motive which prompts her course in the commission of the murder of Duncan. (Goll's Criminal Types in Shakespeare, pp. 138-140.)

[2] Macbeth, Act I, Scene VII.

An agent is one who undertakes to perform some given act or acts for his principal, under the authority of the latter.[1] The term is only used here in a *quasi* legal sense, for in limiting the term to corporal agencies, it means the hands and other organs of the speaker's body, as distinguished from persons in his service.

Sec. 162. Trust, from fiduciary relation.—

"*Macb.* He's here in double trust:
First, as I am his kinsman and his subject,
Strong both against the deed; then, as his host,
Who should against his murderer shut the door,
Not bear the knife myself."[2]

A trust, in law, is an obligation, imposed upon a person, arising out of a confidence reposed in him to perform some act faithfully and according to such confidence.[3] The expression here, is strictly in the legal use of the term, for Macbeth recognizes the obligation imposed upon him, by virtue of the confidence reposed in him by his king. In other words, there is a double trust arising, because of the fiduciary relation existing, of kinsman and subject, and then the entire control and security of his person is

---

[1] 1 Livermore, Agents, 67.

Hotspur is made to say, to Northumberland, in 1' Henry IV (Act I, Scene III):

"*Hot.* . . . . Being the agents or base second means,
The cords, the ladder, or the hangman, rather."

After being curs'd by Troilus for Cressida's perfidy, Pandarus, says, in Troilus and Cressida: "*Pan.* . . O world, world: world: thus is the poor agent despis'd: O traitors and bawds, how earnestly are you set at work, and how ill requited." (Act V, Scene XI.)

In Venus and Adonis, the organs of the body are referred to as agents of the will, in the following lines: "But, when his glutton eye, so full hath fed, His other agents aim at like delight." (399, 400.)

[2] Macbeth, Act I, Scene VII.

[3] 4 Kent's Comm. 295.

also entrusted to him, as a host, which would raise the obligation, likewise, of seeing to his personal security, while the relation of host and guest continued.[1]

Sec. 163. Murder.—

"*Macb.* . . . Now witchcraft celebrates
Pale Hecates offerings; and wither'd murder,
Alarm'd by his sentinel, the wolf,
Whose howl's his watch, thus with his stealthy pace,
With Tarquin's ravishing strides, towards his design,
Moves like a ghost."[2]

Murder is the willful killing of a human being, with malice aforethought.[3] The strongest evidence of malice is a lying in wait, or such stealth as that referred to in this verse. The idea of the wolf acting as sentinel for the murderer, who with stealthy stride glides to his victim, like a ghost, presents a realistic picture of the murderer, with all the legal essentials of the crime.

[1] A "Hospitator," at law, who was a host, or entertainer, was bound to look after the security of his guest, so the Poet but expresses, in this "double trust," the law as it then existed.

[2] Macbeth, Act II, Scene I.

[3] 1 Russell, Crimes, 421; Coke, 3' Inst., 47.

In this same play, the Poet has Macbeth also soliloquize: "Methought I heard a voice cry, sleep no more: Macbeth does murder sleep, the innocent sleep," etc. (Macbeth, Act II, Scene II.)

And again, he said: "Most sacrilegious murder hath broke ope the Lord's annointed temple, and stole hence the life o' the building." (Macbeth, Act II, Scene III.)

And while at the banquet, Macbeth suddenly exclaims:

"Blood hath been shed ere now, i'the olden time,
Ere human statute purg'd the gentle weal;
Aye, and since too, murders have been perform'd
Too terrible for the ear: the times have been
That, when the brains were out, the man would die,
And there an end; but now, they rise again,
With twenty mortal murders on their crowns,
And push us from our stools: This is more strange
Than such a murder is." (Macbeth, Act III, Scene IV.)

Macbeth and Lady Macbeth, are discussed by August Goll, as belonging to a type of political criminals, different in ambitions and motives from that of Brutus, but interesting and true types in themselves. With other criminal types presented in the plays, this scientist takes Shakespeare's criminals as true representatives of the different classes considered. Of course Macbeth's murderous purpose is first suggested by the witches, but after this it needs no encouragement, though the poison of his meditated guilt, at times causes him some misgivings and falterings; his ambition and thirst for power launches him upon the career of crime and these, with the affection for his wife, which also appeals to him in this line, overcame all conscientious scruples and moral reflections. Each murder, however, so works upon his conscience that his remorse is finally most piteous and the character is truly portrayed, throughout, of the political criminal, with such skill that in modern times the character is selected for the student of "criminal types," as furnishing a much better study and one truer to life than the criminals met with in confinement, or their mendacious reports of their crimes and criminal instincts, or those of other writers or students of the subject. (Goll's Criminal Types in Shakespeare, p. 78.)

In King Richard II, the Duchess of Gloster said to Gaunt (Act I, Scene II):

"*Duch.* . . . In suffering thus thy brother to be slaughter'd,
Thou show'st a naked pathway to thy life,
Teaching stern murder how to butcher thee."

Douglas replied to Hotspur, in 1' Henry IV: "*Doug.* Now, by my sword, I will kill all his coats; I'll murder all his wardrobe, piece by piece, until I meet the king." (Act V, Scene III.)

Warwick thus speaks to Gloster and the bishop of Winchester, in 1' Henry VI: "*War.* You see what mischief and what murder too, hath been enacted through your enmity." (Act III, Scene I.)

Replying to his accusers, Gloster, in 2' Henry VI, is made to say:

"*Glo.* . . Unless it were a bloody murderer,
Or foul felonious thief that fleec'd poor passengers,
I never gave them condign punishment:
Murder, indeed, that bloody sin, I tortur'd
Above the felon, or what trespass else." (Act III, Scene I.)

King Henry abjures the duke of Suffolk after Gloster's death, in 2' Henry VI:

"*K. Hen.* . . Upon thy eyeballs, murderous tyranny,
Sits in grim majesty, to fright the world."
(Act III, Scene II.)

Sec. 164 Malice.—

"*Ban.* . . . Fears and scruples shake us:
In the great hand of God I stand; and, thence,
Against the undivulg'd pretence I fight
Of treasonous malice."[1]

Malice is the doing of a wrongful or illegal act, intentionally, without just cause or excuse.[2] Malice is not, necessarily, confined, to the specific intention of doing an injury to a particular person but it extends to an evil design and wicked notion against someone at the time of committing the crime.[3] Hence, Banquo fights against the "undivulg'd pretence of treasonous malice," meaning that the design is to get rid of all who stand in the way of the ambitions of Macbeth, and against this evil intention, he, as but one of the objectionable objects of his malice, must fight.

Suffolk resents the charge of murdering Gloster, in 2' Henry VI, as follows:

"*Suff.* . Why, Warwick, who should do the duke to death,
Myself, and Beaufort, had him in protection;
And we, I hope sir, are no murderers." (Act III, Scene II.)

Warwick thus upbraids Suffolk, in 2' Henry VI:

"*War.* But that the guilt of murder bucklers thee,
And I should rob the deathsman of his fee,
Quitting thee thereby of ten thousand shames,
And that my sovereign's presence makes me mild,
I would, false murderous coward, on thy knee,
Make thee beg pardon for thy passed speech,
And say, it was thy mother that thou meant'st,
That thou thyself wast born in bastardy:
And, after all this fearful homage done,
Give thee thy hire and send thy soul to hell."
(Act III, Scene II.)

Queen Margaret, on the death of her son, in 3' Henry VI, said:

"*Q. Mar.* What's worse than murder, that I may name it?" (Act V, Scene V.)

[1] Macbeth, Act II, Scene III.
[2] 1 Chitty, Criminal Law, 242.
[3] Bacon, Max. Reg. 15.

In King Richard II, the following occurs between King Richard and the Duke of Lancaster:

"*K. Rich.* Tell me, moreover, hast thou sounded him.
If he appeal the duke on ancient malice;
Or worthily, as good a subject should.
On some known ground of treachery in him?
Gaunt. As near as I could sift him on that argument,
On some apparent danger seen in him,
Aim'd at your highness; no inveterate malice." (Act I, Scene I.)

In 2' Henry IV, Falstaff replies to the Chief Justice: "*Fal.* . . all the other gifts appertinent to man, as the malice of this age shapes them, are not worth a gooseberry." (Act I, Scene II.)

Warwick, in 1' Henry VI, said of the Bishop of Winchester: "*War.* An uproar, I dare warrant, begun through malice of the bishop's men." (Act III, Scene I.)

King Henry VI, thus upbraids the Bishop of Winchester, for refusing the olive branch of peace offered by Gloster: "*K. Hen.* Fie, uncle Beaufort, I have heard you preach that malice was a great and grievous sin." (Act III, Scene I.)

Gloster tells the Bishop of Winchester, in 1' Henry VI:

"*Glo.* . . Besides, I fear me, if thy thoughts were sifted,
The king, thy soverign, is not quite exempt,
From envious malice of thy swelling heart."
(Act III, Scene I.)

Speaking of the Cardinal, in 2' Henry VI, Gloster said: "*Glo.* . . Churchman so hot? good uncle hide such malice; with such holiness can you do it." (Act II, Scene I.)

Gloster, after his arrest, tells the king, in 2' Henry VI: "*Glo.* . . Beaufort's red sparkling eyes blab his heart's malice, And Suffolk's cloudy brow, his stormy hate." (Act III, Scene I.)

The wicked Margaret is made to say, in 2' Henry VI, referring to the trial of Gloster, whom she had conspired to have murdered: "*Q. Mar.* God forbid any malice should prevail, that faultless should condemn a nobleman." (Act III, Scene II.)

Edward tells Warwick, in 3' Henry VI: "*K. Edw.* Though fortune's malice overthrows my state, My mind exceeds the compass of her wheel." (Act IV, Scene III.)

Replying to the request of the Dukes of Norfolk and Suffolk to deliver himself to their custody, Cardinal Wolsey said, in Henry VIII: "*Wol.* Till I find more than a will, or words, to do it, (I mean, your malice,) I know, officious lords, I dare and must deny it. Now I feel of what coarse metal ye are molded,—envy.
. . . . . .
Follow your envious courses, men of malice." (Act III, Scene II.)

Sec. 165. Copyhold.—

"*Macb.* O, full of scorpions is my mind, dear wife:
Thou know'st that Banquo and his Fleance lives.
Lady M. But in them nature's copy's not eterne."[1]

This has reference to the common law copyhold estate or tenure. That is, the copy, or lease by which they hold their lives, by nature, has its certain time of termination and is not to be eternal.

A copyhold estate was originally an estate at the will of the lord of the manor, agreeable to custom, evidenced by entries on the roll of the courts baron.[2] The tenure of the tenant of such an estate was by copy of court roll, hence the term, copyholder.[3]

Sec. 166. Single ownership.—

"*Macd.* What concern they?
The general cause? or is it a fee-grief,
Due to some single breast."[4]

Fee, is used in the sense of ownership, and is meant to convey the idea of a several or single right or ownership rather than such ownership in common. A grief due to the commission of some public calamity would be one which affected the public or general weal, as distinguished from that of an individual's welfare, hence the distinction noted, in Macduff's question.

Cranmer, in King Henry VIII, tells his peers: "*Cran.* . . Men, that make Envy, and crooked malice, nourishment, dare bite the best." (Act V, Scene II.)

[1] Macbeth, Act III, Scene II.

[2] 2 Bl. Comm. 95.

[3] 2 Bl. Comm. 95; Tiedeman, R. P. (3'ed.) 19, 23.

[4] Macbeth, Act IV, Scene III.

By reference to Holinshed's and Buchanan's history of Scotland, it will be seen that the Poet, in Macbeth, has adhered strictly, in plot and scope of the play to the traditions of history. In giving the interview between Malcolm and Macduff, at the English Court, the text of the play, in part uses the same language as that of history and the conversation is presented in the same order.

CHAPTER XVI.

"KING JOHN."

Sec. 167. Controversy—Judgment on.
168. Descent to eldest son.
169. Bastard's right to inheritance.
170. Child begot when father not *infra quatuor maria.*
171. Legitimacy of child born during lawful wedlock.
172. Testamentary disposition, disinheriting bastard.
173. Landed 'Squire.
174. Seduction.
175. Arbitration.
176. Usurpation—Denial of rights.
177. Equity.
178. Canon of the Law.
179. Abstract and Brief.
180. Indenture.
181. Rape.
182. Interrogatories.
183. Tithes—Toll.
184. Laws' redress of wrongs.
185. Keeping the Peace.
186. Source of Sovereign power.

Sec. 167. Controversy—Judgment on.—

"*Essex.* My liege, here is the strangest controversy,
Come from the country to be judged by you,
That ere I heard: Shall I produce the men?"[1]

A controversy is any dispute arising between two or more persons and the word is frequently used to apply to an issue over questions of law, to be submitted to one of authority for a decision. The word is not so broad as the word case, which applies to suits of a criminal as well as a civil nature, so the term is used here in regard to an issue over property rights.[2]

[1] King John, Act I, Scene I.
[2] Bouvier's Law Dictionary.

Sec. 168. Descent to eldest son.—

"*K. John.* What art thou?
Rob. The son and heir to that same Faulconbridge.
K. John. Is that the elder, and art thou the heir?
You came not of one mother, then, it seems."[1]

The seeming surprise of the king, that the younger son should be the heir of the father, if they came from one mother, is because of the rule of the English law, which devolved the estate of the parent upon the eldest son.[2] This was the rule of primogeniture, which gave the first born the estate of the parent.[3]

Sec. 169. Bastard's right of inheritance.—

"*Bast.* Most certain of one mother, mighty king,
That is well known; and, as I think, one father;
But, for the certain knowledge of that truth,
I put you o'er to heaven and to my mother;
Of that I doubt, as all men's children may.
Eli. Out on thee, rude man: thou 'dost shame thy mother,
And wound her honour with this diffidence.
Bast. I, madam? no, I have no reason for it;
That is my brother's plea and none of mine;
The which, if he can prove, 'a pops me out
At least from fair five hundred pounds a year;
Heaven guard my mother's honour and my land.
K. John. A good blunt fellow:—Why, being younger born,
Doth he lay claim to thine inheritance?
Bast. I know not why, except to get the land.
But once he slander'd me with bastardy:
But whe'r I be as true begot, or no,
That still I lay upon my mother's head;
But that I am as well begot, my liege,
(Fair fall the bones that took the pains for me:)
Compare our faces and be judge yourself.
. . . . . .

---

[1] King John, Act I, Scene I.
[2] 2 Bl. Comm. 214, 215.
[3] Tiedeman, R. P. (3' ed.) Sec. 474.

K. John. Sirrah, speak, what doth move you to claim
your brother's land?
Bast. Because he hath a half-face, like my father;
With that half-face, would he have all my land:
A half-faced groat five hundred pounds a year."[1]

Phillip's reference to the claim of his brother to his land, because of his own bastardy, is a recognition of the legal basis for his suit. At common law a bastard had no inheritable blood.[2] He was, in the eye of the law, *nullius filius,* and was incapable of inheriting, as an heir, either to his putative father, or his mother, or to any one else, nor could he have heirs, save of his own body.[3] This rule was supposed to be founded in policy, to discourage illicit intercourse, but if the rule of law, instead of visiting the crime of the parent upon the issue of the illicit act, had prevented the mother from inheriting from the bastard, it would have better achieved this purpose, than it did, in permitting her to take of the bastard, but denying him, the innocent party, this right, as to her land or other property.[4]

While a man was held to be a bastard, although born during coverture, under circumstances where it was impossible for the husband of his mother to have been his father,[5] the proof of such a fact had to be of a very strong and cogent nature to overcome the presumption of legitimacy, of a child born after lawful wedlock,[6] hence the reference of this issue, by Phillip, to his mother, as the most competent witness on this issue, his father being dead.[7]

---

[1] King John, Act I, Scene I.
[2] 2 Kent's Comm. 210; Coke, Litt., 123b.
[3] 1 Bl. Comm. 459.
[4] Gilbert, Tenures, 20; 4 Kent's Comm. 417.
[5] 1 Bl. Comm. 458.
[6] Gardner, Peerage Case, Le M. Rep; 1 Bl. Comm. 458.
[7] The evidence of the mother is not admissable to prove access or non-access, it is held, in the United States. 2 Kent's Comm. 212; 29 Pa. 420; 15 Ga. 160.

Sec. 170. Child begot when father not infra quatuor maria.—

"*Rob.* My gracious liege, when that my father liv'd,
Your brother did employ my father much;—
. . . . . .
And once, dispatch'd him in an embassy
To Germany, there, with the emperor,
To treat of high affairs, touching that time;
The advantage of his absence took the king,
And in the meantime sojourn'd at my father's;
Where now he did prevail, I shame to speak;
But truth is truth; large length of seas and shores,
Between my father and my mother lay
(As I have heard my father speak himself)
When this same lusty gentleman was got.
Upon his death bed he by will bequeath'd
His lands to me; and took it on his death,
That this, my mother's son, was none of his;
And, if he were, he came into the world,
Full fourteen weeks before the course of time.
Then, good my liege, let me have what is mine,
My father's land, as was my father's will."[1]

This verse presents the substance of Robert's claim to his brother's land, because of the bastardy of Phillip.

Edmond is made to say, in King Lear, regarding his inability to inherit, as a bastard, from his father: "Let me, if not by birth, have lands by wit: All with me's meet, that I can fashion fit." (Act I, Scene II.)

In King Lear, Gloster speaks of his legitimate son, as his heir, or son, "by order of law," in the following lines:

"*Glo.* But I have, sir, a son by order of law, some year elder than this, who yet is no dearer in my account." (Act I, Scene I.)

Gloster tells Edmund, in King Lear: "Loyal and natural boy, I'll work the means to make thee capable," meaning that he will remove the legal impediment, because of his bastardy, so he can inherit land. (Act II, Scene I.)

Tarquin taunts the honest Lucrece that after his crime her children or issue shall be "blurr'd with nameless bastardy." (521.)

A bastard did not know his father and hence, could have no name, and was known at law as without an inheritance, or *nullius filius.*

[1] King John, Act I, Scene I.

The embassy of his father is mentioned to bring his case within the rule of law, that to establish bastardy against one born of lawful wedlock, it must be shown that the husband of the mother was where he could have had no access to her during the period of gestation. From the time of the Year Books, until the early part of the last century, the issue of a married woman was made legitimate, except on proof of the impotency of the husband or that he was "beyond the four seas," during the period of gestation.[1] In other words, if the claim had been presented by other than hearsay evidence, on Robert's part, in establishing that his father was not *infra quatuor maria,* when Phillip was begot, he established a *prima facia* case, at common law, to the land of his father, which the bastardy of his brother would have prevented him from inheriting.[2]

[1] Coke, Litt., 244; 1 Bl. Comm. 456, 457.

[2] 1 Bl. Comm. 455.

Ever since the case of Pendrell vs. Pendrell, Str. 925, the doctrine of issue born of lawful wedlock, is illegitimate if the husband was *infra quatuor maria,* has been exploded, and the fact of access or non-access is to be determined like any other fact in the case, by competent evidence. See Nicholas, Treatise on Law of Adulterine Bastardy, 1836.

In urging the false accusation of King Edward's bastardy, against his own mother, to accomplish the overthrow of the children of his dead brother, King Richard III said to Buckingham: "*Glo.* . . Tell them, when that my mother went with child,

> Of that insatiate Edward, noble York,
> My princely father, then had wars in France;
> And, by just computation of the time,
> Found, that the issue was not his begot.,'
>
> (Act III, Scene V.)

Richard asks Buckingham, touching his false circulation of the bastardy of his dead brother, Edward: "*Glo.* Touch'd you the bastardy of Edward's children?" And Buckingham replies: "*Buck.* . . his own bastardy, As being got, your father then in France; And his resemblance, being not like the duke." (King Richard III, Act III, Scene VII.)

Sec. 171. Legitimacy of child born during lawful wedlock.—

"*K. John.* Sirrah, your brother is legitimate;
Your father's wife did, after wedlock, bear him:
And, if she did play false, the fault was hers;
Which fault lies on the hazards of all husbands
That marry wives. Tell me, how, if my brother,
Who, as you say, took pains to get this son,
Had of your father claimed this son for his?
In sooth, good friend, your father might have kept
This calf, bred from his cow, from all the world;
In sooth, he might: Then, if he were my brother's,
My brother might not claim him; nor your father,
Being none of his, refuse him: This concludes,—
My mother's son did get your father's heir;
Your father's heir must have your father's land."[1]

The decision as to the legitimacy of Phillip was strictly according to the legal standards existing at the time this play was written. The rule of law was formerly very strict in favor of the legitimacy of a child born of a married woman. While the point was not necessary to the decision of the cases and the remarks on this head were more or less *obiter*, it was decided in two early English cases,[2] that there must be non-access established during the whole period of pregnancy, in order to bastardize the issue. Rolle, states the law then to be, "By the law of the land no man can be a bastard who is born after marriage, unless for special matter,"[3] and Mr. Justice Blackstone, speaking of the old doctrine says: "If the husband be out of England, (or as the law somewhat loosely phrases it, *extra quatuor maria*) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But generally, (he adds, with reference to the latter determination, engrafted on the old rule,) during the coverture, access of the

[1] King John, Act I, Scene I.

[2] Regina vs. Murray, Salk. 122; Rex vs. Albertson, 1 Lord Ray, 395; Salk. 484; Carth, 469.

[3] 1 Rol. Abr. 358, tit. Bastard, letter B.

husband shall be presumed, unless the contrary can be shown."[1] It was decided that bastardy would not be found, when it was not shown that the husband had been "beyond seas," for forty weeks before the birth of the child;[2] it was generally held essential, even in later times, to establish the absolute impossibility of access of the husband during the natural period of gestation,[3] and Lord Ellenborough, in a case decided the early part of the last century, refused to enter into the realm of mere probabilities, in such a case, but required a showing of absolute physical impossibility of the husband's being the father of the child.[4]

As the case made, on the facts presented, did not present such strong probative force as to overcome the legal presumption of legitimacy, the inheritance, as a consequence of the conclusion against the bastardy of Phillip, would go to him.

Sec. 172. Testamentary disposition disinheriting bastard.—

"*Rob.* Shall then my father's will be of no force,
To dispossess that child which is not his?
Bast. Of no more force, to dispossess me, sir,
Than was his will to get me, as I think."[5]

The rule of the common law was that illegitimate children did not take, under a testamentary devise to the testator's children, and it was necessary that there should be evidence collected from the will itself, or from other competent source, to show affirmatively that the testator intended that his illegitimate children should inherit his estate, or they were not included.[6] Of course, where the

---

[1] Bl. Comm. 457.
[2] Rex vs. Albertson, Carthew, 468, 9.
[3] Goodright vs. Saul, 4 Term. Rep. 356.
[4] King vs. Luffe, 8 East, 193, p. 207.
[5] King John, Act I, Scene I.
[6] See opinion of Master of the Rolls, in Bagley vs. Mollard, 1 Russ. & My. 581.

fact of illegitimacy is established by competent evidence, if the testator's will expressly decided against the illegitimate child, then it would be doing violence to his intent, to permit such a child to inherit his land, and this is the rule invoked by Robert, in this verse.

Sec. 173. Landed 'Squire.—

"*K. John.* Go, Faulconbridge; now hast thou thy desire,
A landless knight makes thee a landed 'squire."[1]

"Squire" is a contraction of the word esquire, which was a title applied by courtesy to various officers, members of the bar and others. The use of the term confers no particular distinction in law, but it was a title, in England, above that of a gentleman and below that of a knight. The eldest son of a knight and their eldest sons, in perpetual succession, were one class of esquires[2] and justices of the peace and others who bore any office of trust under the crown, were called esquires. Robert, as the eldest son of a knight, was thus properly entitled to the term, as applied to him by King John.

---

[1] King John, Act I, Scene I.

[2] Camden.

Speaking of Shallow, Falstaff said, in 2' Henry IV (Act III, Scene II): "*Fal.* . . And now is this Vice's dagger become a 'squire; and talks as familiarly of John of Gaunt, as if he had been sworn brother to him."

Shallow answers to Bardolph as follows: "*Shal.* I am Robert Shallow, sir; a poor esquire of this county and one of the king's justices of the peace: What is your good pleasure with me?" (2' Henry IV, Act III, Scene II.)

Referring to his desertion, before the battle of Patay, Talbot said of Fastolfe in 1' Henry VI:

"*Tal.* . . Before we met, or that a stroke was given,
Like to a trusty 'squire, did run away." (Act IV, Scene I.)

Before fighting Cade, Iden, said, in 2' Henry VI: "*Iden.* Nay, it shall ne'er be said, while England stands, That Alexander Iden,

Sec. 174. Seduction.—

"*Bast.* . . . But, mother, I am not sir Robert's son,
I have disclaimed Sir Robert and my land.
Legitimation, name and all is gone:
Then, good, my mother, let me know my father:
Some proper man, I hope; who was it mother?
Lady F. Hast thou denied thyself a Faulconbridge?
Bast. As faithfully as I deny the devil.
Lady F. King Richard Coeur-de-lion was thy father;
By long and vehement suit I was seduc'd
To make room for him in my husband's bed."[1]

Seduction, in criminal law, is the act of a man in inducing a woman to commit unlawful sexual intercourse with him.[2] The crime may as well be committed against a married woman, as against an unmarried female,[3] and on such a trial there is a presumption of chastity on the part of a woman of previously good reputation.[4]

---

an esquire of Kent, Took odds to combat a poor famish'd man." (Act IV, Scene X.)

And on presenting Cade's head to the king, Iden said: "*Iden.* Alexander Iden, that's my name; A poor esquire of Kent, that loves his king." (Act V, Scene I.)

Emilia tells Iago, in Othello, in defending Desdemona:

"O, fie upon him: some such 'squire he was,
That turn'd your wit the seamy side without,
And made you to suspect me with the Moor."

(Act IV, Scene II.)

[1] King John, Act I, Scene I.

[2] Bouvier's Law Dictionary.

[3] 2 Bishop, Cr. Proc. sec. 95.

[4] 1 Bishop's Cr. Proc. 1106.

The earl of Cambridge, in Henry V, said: "*Cam.* For me,—the gold of France did not seduce." (Act II, Scene II.)

Referring to the forces of King Edward, in 3' Henry VI, Exeter said: "*Exe.* The doubt is, that he will seduce the rest." (Act IV, Scene VIII.)

Cassius reflects, after his conference with Brutus, over Cæsar's ambitious nature: "*Cas.* Therefore 'tis meet That noble minds keep ever with their likes: For who so firm, that cannot be seduc'd." (Julius Cæsar, Act I, Scene II.)

Sec. 175. Arbitration.—

"*Eli.* . . . This might have been prevented and made whole,
With very easy arguments of love;
Which now the manage of two kingdoms must
With fearful bloody issue arbitrate."[1]

Arbitration is the investigation and settlement of the differences between contending parties, by one or more persons chosen by the parties, called arbitrators.[2] Any matter may be settled and finally adjusted by arbitration, which the parties themselves might have settled by contract or which could be the subject of an action at law. The use of the word, as it is found in this verse, is not strictly in its legal sense, for instead of showing an avoidance of the differences by agreement to submit to the judgment of disinterested persons, there is rather an absence of arbitration and a conflict over the rights, not adjusted by arbitration. But the word in its popular meaning is used as the Poet uses it here.

---

[1] King John, Act I, Scene I.

[2] 3 Bl. Comm. 16; Bacon, Abr.

In King Richard II (Act I, Scene I), the duke of Norfolk, replies to Bolingbroke:

"*Nor.* Let not my cold words here accuse my zeal;
'Tis not the trial of a woman's war,
The bitter clamor of two eager tongues,
Can arbitrate this cause betwixt us twain."

Mortimer welcomed death, in 1' Henry VI, as follows: "Just death, kind umpire of men's miseries, With sweet enlargement, doth dismiss me hence." (Act II, Scene V.)

Hector, replies to Ulysses, who predicts the fall of Troy, in Troilus and Cressida, as follows: "*Hect.* . . The end crowns all; and that old common arbitrator, time, will one day end it." (Act IV, Scene V.)

Before taking the potion, Juliet observes, while looking on her dagger:

"Twixt my extremes and me this bloody knife
Shall play the umpire; arbiting that
Which the commission of thy years and art
Could to no issue of true honor bring."

(Romeo and Juliet, Act IV, Scene I.)

Sec. 176. Usurpation—Denial of rights.—

"*Chat.* Phillip of France, in right and true behalf
Of thy deceased brother Geffrey's son,
Arthur Plantagenet, lays most lawful claim,
To this fair island and the territories;
To Ireland, Poictiers, Anjou, Touraine, Maine;
Desiring thee to lay aside the sword,
Which sways usurpingly these several titles;
And put the same into young Arthur's hand,
Thy nephew, and right royal sovereign."[1]

Usurpation, in governmental law, is the tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.[2] Lord Coke spoke of usurpation arising whenever a subject used the franchise of the king, without lawful authority,[3] and this is the sense in which the term is used in this verse.

Sec. 177. Equity.—

"*K. Phi.* . . . For this down-trodden equity, we tread,
In warlike march these greens before your town."[4]

"Equity," in the broadest sense, signifies natural justice. In the meaning given to the term by the Poet, it denotes equal justice between contending parties for the right. This is the moral significance of the term, with reference to the rights of parties having conflicting claims.

In the more limited use of the word, equity is applied to the courts of equity, as distinguished from the courts of law, and is used to signify the remedial procedure by

---

[1] King John, Act I, Scene I.

[2] Bouvier's Law Dictionary.

[3] Coke, Litt. 277b.

In 2' Henry VI, the petitioner, Peter, when questioned as to what his master had said of the King, said: "*Peter.* . . my master said that he was, and that the king was an usurper." (Act I, Scene III.)

[4] King John, Act II, Scene I.

which these courts grant redress, as distinguished from the forms and proceedings in courts of law.[1]

Sec. 178. Canon of the law.—

"*Const.* . . . Thy sins are visited in this poor child;
The canon of the law is laid on him,
Being but the second generation
Removed from thy sin-conceiving womb."[2]

A canon is a rule of doctrine applied to designate the ordinances of councils or the decrees of the pope. The system of canon law, as administered in different countries, varies according to the recognition of the papal rules, beyond the dominions of the country where they are announced. The canon law has been a distinct branch of the law in the English ecclesiastical courts for many centuries, but the modification of the jurisdiction of those courts, of more recent years, has greatly reduced its independent importance as a branch of the law of that country.[3]

Sec. 179. Abstract and brief.—

"*K. Phi.* . . . This little abstract doth contain that large,
Which died in Geffrey; and the hand of time
Shall draw this brief into as huge a volume."[4]

An "abstract," in law, is a short account of the different portions of the lawsuit, with a synopsis of the evidence

---

[1] Bouvier's Law Dictionary; Crabb's Hist. Eng. Law; Reeves' Hist. Eng. Law.

Falstaff said to his companions, on dividing the booty from the robbery of the travelers, in 1' Henry IV: "*Fal.* . . An' the Prince and Poins be not two arrant cowards, there's no equity stirring." (Act II, Scene II.)

[2] King John, Act II, Scene I.

[3] Bouvier's Law Dictionary; 1 Bl. Comm. 82. The above verse refers to the biblical injunction that the sins of the parent shall be visited upon the children, even to the second generation.

[4] King John, Act II, Scene I.

offered at the trial, or of the distinctive portions thereof, sufficient for a full and fair consideration of the cause, before the court.[1] Abstracts are filed in appeal cases, before the brief is filed for the perusal of the court, wherein the cause is pending. A "brief" is an abridged statement of the parties' cause, with a presentation of the points or issues involved in the cause.[2] The object of the brief is to inform the person deciding the case of the important points for him to consider in making up his judgment in the cause. That the son of Geffrey, compared to a brief, would, by "the hand of time" be drawn into as huge a volume as his father, is the poetic conclusion which Shakespeare makes King Phillip draw, from the use of these legal terms.

Sec. 180. Indenture.—

"*Aust.* Upon thy cheek lay I this zealous kiss,
As seal to this indenture of my love."[3]

An "indenture," at common law, was any deed, or written instrument, between two or more persons, as distinguished from a deed pole, which was made by a single

---

[1] Wharton, Law Dictionary.

[2] Bouvier's Law Dictionary.

The Duchess of York, on learning of the death of her grandchildren, the sons of King Edward, said: "*Duch.* Brief abstract and record of tedious days, Rest thy unrest on England's lawful earth." (King Richard III, Act IV, Scene IV.)

Speaking of Antony, Cæsar, is made to say, in Antony and Cleopatra:

"*Caes.* . . . You shall find there
A man who is the abstract of all faults
That all men follow." (Act I, Scene IV.)

Cleopatra tells Cæsar, in Antony and Cleopatra: "This is the brief of money, plate and jewels, I am possess'd of." (Act V, Scene II.)

In speaking to Polonius, of the Players, Hamlet said: "*Ham* . . . Do you hear, let them be well used; for they are the abstract and brief chronicles of the times." (Act II, Scene II.)

[3] King John, Act II, Scene I.

individual.[1] The name was adopted from the practice of indenting or scolloping the top or side of the instrument, with some word written over such indentations and then as many copies were delivered as there were parties to the contract, leaving part of each letter on either side of the line, so that the parts could be placed together and thus authenticated.[2]

As this form of agreement was a specialty contract, a seal was necessary thereon, hence the comparison of the kiss to the "seal to this indenture."

Sec. 181. Rape.—

"*K. Phi.* . . . But thou from loving England art so far,
That thou hast under-wrought his lawful king,
Cut off the sequence of posterity,
Outfaced infant state, and done a rape
Upon the maiden virtue of the crown."[3]

"Rape," in its broadest sense, means to snatch, or seize with violence,[4] and but for the connection in which the

[1] 1 Reeve's Hist. Eng. Law, 89.

[2] Coke's, Litt., 143b, 229a; Tiedeman, R. P. (3d ed.) 587.

In 1' Henry IV, Prince Henry said to Francis: "*P. Hen.* Five years: by'r lady, a long lease for the clinking of pewter. But, Francis, dar'st thou be so valiant, as to play the coward with thy indenture, and to show it a fair pair of heels and run from it?" (Act II, Scene IV.)

Hotspur is made to say in 1' Henry IV: "*Hot.* 'Tis the next way to turn tailor, or be red-breast teacher. An' the indentures be drawn, I'll away within these two hours; and so come in when ye will." (Act III, Scene I.)

Thaliard, in Pericles, Prince of Tyre, observes, that "if a king bid a man be a villain, he is bound, by the indenture of his oath, to be one." (Act I, Scene III.)

In King John (Act II, Scene I), the Duke of Austria is made to say, to Arthur:

"Upon thy cheek lay I this zealous kiss,
As seal to this indenture of my love."

[3] King John, Act II, Scene I.

[4] The word is from the Latin *rapere*, meaning to snatch, or seize.

word is used in this verse it might be implied that it was intended in this sense, but the last line of the verse leaves no doubt, but what the term was meant to be used as it is in criminal law, wherein its meaning is the carnal knowledge of a woman, by a man, forcibly and against her will.[1] In the perpetration of this crime, if the consent of the woman was not voluntarily and freely given, at the time of the commission of the offense, her subsequent consent would not affect the guilt of her wrongdoer, and a female of tender years was incapable of consent under the English statute[2] and the carnal knowledge of such female was consequently against her will and conclusively presumed to have been committed with violence, hence the reference to the commission of such a crime against "the maiden virtue of the crown."

---

[1] 12 Coke, 37; 4 Sh. Bl. Comm. 213; 2 Bishop, Cr. Law, 942; 2 Chit. Cr. Law, 810.

[2] 2 Westminster, c. 34; 18 Eliz. c. 7, s. 4.

Paris thus attempts to justify his rape of Helen, in Troilus and Cressida:

"*Par.* Sir, I propose, not merely to myself,
The pleasures such a beauty brings with it;
But I would have the soil of her fair rape
Wip'd off, in honourable keeping her." (Act II, Scene II.)

The Poet distinguishes between the act of carnal knowledge with one's wife and the crime of rape, in the following lines, in Titus Andronicus:

"*Sat.* Traitor, if Rome have law, or we have power,
Thou and thy faction shall repent this rape.
Bas. Rape, call you it, my lord, to seize my own,
My true-betrothed love, and now my wife?"
(Act I, Scene II.)

In Titus Andronicus, Aaron, the Moor, reflects upon the crime of rape:

"*Aar.* And many unfrequented plats there are,
Fitted by kind for rape and villainy." (Act II, Scene I.)

Aaron, the Moor, before his confession, says, in Titus Andronicus:

"*Aar.* I must talk of murders, rapes, and massacres,
Acts of black night, abominable deeds,
Complots of mischief, treason; villanies
Ruthful to hear, yet piteously perform'd." (Act V, Scene I.)

Sec. 182. Interrogatories.—

"*K. John.* What earthly name to interrogatories,
Can task the free breath of a sacred king?"[1]

"Interrogatories" were the material and pertinent questions, in writing, exhibited for the examination of witnesses, or persons giving testimony in a cause.[2] Either party, plaintiff or defendant, may generally exhibit original or cross interrogatories to the witnesses in a cause.[3] But for scandal or impertinence interrogatories could, under certain circumstances, be suppressed,[4] and the practice of submitting interrogatories to a king, never having been recognized by the common law, is denounced, in the opinion of King John, as inconsistent with his royal prerogative.

Sec. 183. Tithes—toll.—

"*K. John.* . . . Tell him this tale; and from the mouth of England,
Add thus much more,—That no Italian priest
Shall tithe or toll in our dominions."[5]

"Tithes," in English law, were the tolls paid by the English subjects for the support of the clergy and consisted in the right of the clergy to a tenth part of the produce of land, or the stock upon the land and the proceeds of the personal industry of the inhabitants.[6] Tithes have never obtained in the United States, but the clergy is supported by the voluntary zeal of the people for religion.

The despairing Lucrece, makes her complaint at Opportunity that

"Wrath, envy, treason, rape, and murder's rages,
Thy heinous hours wait on them as their pages." (909, 910).

[1] King John, Act III, Scene I.
[2] Bouvier's Law Dictionary.
[3] Bacon, Abr.; Hind, Ch. Pr., 317.
[4] Gresley, Eq. Evid. pt. 1, ch. 3, sec. 1.
[5] King John, Act III, Scene I.
[6] Bacon, Abr.; Cruise, Dig. 22.

Sec. 184. Laws redress of wrongs.—

"*Pand.* There's law and warrant, lady, for my curse.
Const. And for mine too; when law can do no right,
Let it be lawful, that law bar no wrong:
Law cannot give my child his kingdom here;
For he, that holds his kingdom, holds the law:
Therefore, since law itself is perfect wrong,
How can the law forbid my tongue to curse."[1]

That the Poet understood the scientific definition of the term "law," is evidenced by this verse, as law is defined by the best authority as "a rule of civil conduct, commanding what is right and prohibiting what is wrong."[2] "When law can do no right," it ceases to attain the sole and sufficient object of law, according to this approved definition, and if unable to enforce the right, the conclusion is analogous that the law should "bar no wrong." In other words, since the law, by the authority of the supreme power of state, whose function it is to enforce the law, had been perverted and from the enforcement of rights, it had descended to the enforcement or defense of wrongs, Constance concluded that the law had thus recognized the wrong, instead of the right, as the ultimate object of the law.

Sec. 185. Keeping the peace.—

"*Pem.* Cut him to pieces.
Bast. Keep the peace, I say."[3]

"Peace" imports, in a legal sense, not merely the repose and tranquility of a community or state, as opposed to violence and warfare, but it implies, as well, a state of

---

The Hostess replies to Falstaff's charge of robbery in her house, as follows, in 1' Henry IV: "*Host.* Do you think I keep thieves in my house? I have searched, I have enquired, so has my husband, man by man, boy by boy, servant by servant: the tithe of a hair was never lost in my house before." (Act III, Scene III.)

[1] King John, Act III, Scene I.
[2] 1 Bl. Comm. 44.
[3] King John, Act IV, Scene III.

public order and decorum or a compliance with the laws.[1] In reply to the insistence of Pembroke to "Cut him to pieces," which would be a violation of the law and a consequent disturbance of the peace, Philip enjoined upon them that they should "keep the peace." This rejoinder is not only a request to comply with the law, in legal terms, but is also an apt play upon the words used by Pembroke.

Sec. 186. Source of sovereign power.—

"*K. John.* Thus have I yielded up into your hand the
circle of my glory.
Pand. Take again, from this my hand, as holding of
the pope,
Your sovereign greatness and authority."[2]

This ceremony of coronation is in keeping with that followed in the day and time to which the play relates, according to the forms of law then obtaining. The pope was regarded not only as the head of the Roman Catholic church, but as such, was the source for both temporal and spiritual power and while the ceremony of crowning a king whose adherents were sufficiently strong to give him the throne always seemed to accord with the will of the church, the pope, as the head of the church was supposed to ratify the granting of sovereignty to the king.

---

[1] Bacon, Abr.; 2 Bentham, 319.

[2] King John, Act V, Scene I.

Bolingbroke, on taking the crown, in King Richard II, is made to say: "*Boling.* In God's name I'll ascend the regal throne." (Act IV, Scene I.)

CHAPTER XVII.

"KING RICHARD THE SECOND."

Sec. 187. Appellant.
188. Accuser and accused.
189. Impeachment.
190. Deposing, according to Law.
191. Trial by battle.
192. Party-verdict.
193. Reversion.
193a. Dying declarations.
194. Waste upon real estate.
195. Landlord.
196. Lease—Tenement.
197. Possessed.
198. Royalties.
199. Attorneys-General.
200. Letters-patent.
201. Seize.
202. Fine.
203. Repeal.
204. Covenant.
205. Breaking Laws.
206. Livery.
207. Attorneys.
208. Executors.
209. Failure to speak, in criminal case—Standing mute.
210. Signories.
211. Under gage.
212. Day of trial.
213. Answer.
214. Crimes.
215. Manors.
216. Conspiracy.

Sec. 187. Appellant.—

"*Boling.* First (heaven be the record of my speech:)
In the devotion of a subject's love,
Tendering the precious safety of my prince,
And free from other misbegotten hate,
Come I appellant to this princely presence."[1]

[1] King Richard II, Act I, Scene I.

The appellant, in a lawsuit, is the party who appeals from one jurisdiction or forum to another, for the further prosecution of his cause.[1] After making the charge or accusation against Norfolk, Bolingbroke followed it up by bringing the same charge before the king, when the right of trial by battle was invoked by the accused.

Sec. 188. Accuser and accused.—

"*K. Rich.* Then call them to our presence; face to face,
And frowning brow to brow, ourselves will hear,
The accuser and accused, freely speak."[2]

The accuser is one who makes a criminal charge or accusation against another,[3] and the accused is one against whom such charge or accusation is made.[4] It is one of the rights guaranteed to an Englishman that when accused of a crime he has the right to have the witnesses brought before him, face to face, hence the king but recognized the lawful right of Norfolk to have his accuser face him in the charge of treason, in the above verse.

Sec. 189. Impeachment.—

"*Nor.* . . . My life thou shalt command, but not my shame:
The one my duty owes; but my fair name,
(Despite of death, that lives upon my grave,)

[1] Bouvier's Law Dictionary.

The Marshal, in this play, referring to Mowbray's readiness to meet Bolingbroke, said:

"*Mar.* The duke of Norfolk, sprightfully and bold,
Stays but the summons of the appellant's trumpet."
(Act I, Scene III.)

The Marshal tells the King:

"*Mar.* The appellant in all duty greets your highness,
And craves to kiss your hand and take his leave."
(Act I, Scene III.)

In Antony and Cleopatra, Eros advises Enobarbus that "Cæsar, . . . accuses him of letters he had formerly wrote to Pompey; upon his own appeal seizes him." (Act III, Scene V.)

[2] King Richard II, Act I, Scene I.

[3] Bouvier's Law Dictionary.

[4] *Ante idem.*

To dark dishonour's use, thou shalt not have.
I am disgrac'd, impeach'd, and baffled here."[1]

All civil officers at common law were liable to impeachment, which was a written accusation against the officer or person impeached, charging him with treason, bribery, or other high crimes or misdemeanors.[2] The term is also used when applied to the kind of evidence which destroys the credibility of a witness in a cause on trial.[3] All witnesses are liable to be impeached by evidence of general reputation for truth or veracity and if one's general character is good, one is always supposed, in law, to be able to defend it.

Impeachment is used in this verse in the sense of its application to an officer, or a person charged with treason, as this was the charge brought against the duke of Norfolk by Bolingbroke.

Sec. 190. Deposing, according to law.—

"*K. Rich.* Marshall, ask yonder knight in arms,
Both who he is, and why he cometh hither
Thus plated in habiliments of war;
And formally, according to our law,
Depose him, in the justice of his cause."[4]

[1] King Richard II, Act I, Scene I.

[2] Story, Const. Law, Sec. 795.

[3] Greenl. Evid. vol. 1.

In the United States, the house of representatives has the sole power of impeachments and the senate of the United States is given, by organic law, the sole right of trying impeachments. (Con. U. S. Art. 1, Secs. 2, 3, c. 5, 6.)

On discovering the treason of his own son, the Duke of York exclaims:

"*York.* Now by mine honour, my life, my troth,
I will appeach the villain." (Richard II, Act V, Scene II.)

Clarence's son, on speaking of his father's death, in Richard III, said: "*Son.* . . my good uncle Gloster told me, the king, provok'd to it, by the queen, devis'd impeachments, to imprison him." (Act II, Scene II.)

[4] King Richard II, Act I, Scene III.

One is said to "depose," when he testifies under oath, or gives his deposition.[1] Before a witness testifies, he is deposed, or sworn to tell the truth in the cause before the court. In other words, when a party to a cause is called as a witness—and at common law a party in interest was incompetent as a witness—he was deposed, "according to our law," as the king directs the marshal, in this verse.

Sec. 191. Trial by battle.—

"*Mar.* What is thy name? and wherefore com'st thou hither,
Before king Richard, in his royal lists?
Against whom comest thou; and what's thy quarrel?
Speak, like a true knight, so defend thee heaven.
Boling. Harry of Hereford, Lancaster and Derby,
Am I; who ready here do stand in arms,
To prove, by heaven's grace and my body's valour,
In lists, on Thomas Mowbray, duke of Norfolk,
That he's a traitor, foul and dangerous,
To God of heaven, king Richard and to me;
And, as I truly fight, defend me heaven.

. . . . . .

K. Rich. We will descend, and fold him in our arms,
Cousin of Hereford, as thy cause is right,
So be thy fortune in this royal fight:
Farewell, my blood; which if to-day thou shed,
Lament we may, but not revenge thee dead.

. . . . . .

Nor. (*Rising*) However heaven, or fortune cast my lot,
There lives or dies, true to king Richard's throne,
A loyal, just and upright gentleman:
Never did captive with a freer heart,
Cast off his chains of bondage and embrace
His golden uncontroll'd enfranchisement,
More than my dancing soul doth celebrate
This feast of battle with mine adversary.

. . . . . .

[1] 3 Greenl. Evid., sec. 11.

Depose, is used here in an entirely different sense than it is in the Act where Northumberland urges King Richard to confess his crimes, so that the souls of men may deem that he was "worthily deposed." (King Richard II, Act IV, Scene I.)

K. Rich. Farewell, my lord; securely I espy,
Virtue with valour couched in thine eye,—
Order the trial, Marshall, and begin."[1]

In the old English law, issues in both civil and criminal cases were settled, at an early day, by the "trial by battle," which had its basis upon the supposition that heaven would always interpose and give the victory to the champion of truth and innocence.[2] The right to such a trial could be claimed at the election of the accused person, by the plea of not guilty and by declaring his readiness to make good his plea by his body. When such a right was claimed, the accuser had to make good his appeal and meet the accused in mortal combat. A Court was erected for the judges and after certain preliminaries the battle commenced; it was continued from sun-rise until evening and if the accuser cried craven, or was killed, the accused was held to be acquitted of the charge. On the contrary, if the accused was vanquished or killed, he was adjudged guilty and hanged, if he was not killed in the battle, and, in either case, his blood was thereafter attainted,[3] so that his heirs were cut off from inheriting from him, and all his posterity was made base and ignoble.[4]

[1] King Richard II, Act I, Scene III.

[2] 1 Hale, Hist. Com. Law, 188.

[3] 3 Bl. Comm. 337; 4 Bl. Comm. 346.

[4] Co. Litt. 391b. For history of English law, of trial by battle, see I Reeve's Hist. Eng. Law, p. 393; III Reeve's History Eng. Law, p. 329; IV Reeve's History Eng. Law, p. 58, and citations.

By way of further illustration of this proceeding, a Lord is made to offer the gage to the Duke of Aumerle, as follows:

"*Lord.* From sun to sun, there is my honour's pawn; Engage it to the trial, if thou dare'st."

And the Duke of Surrey likewise is made to offer battle to Lord Fitzwater, as follows:

"*Surrey.* In proof whereof, there is my honour's pawn,
Engage it to the trial, if thou dar'st."

(King Richard II, Act IV, Scene I.)

A trial by battle, occurred in England in 1571 (Dyer, p. 801) and as late as 1818, after a full discussion, the right to such a

trial was allowed by the judges in England. (Ashford vs. Thornton, 1 Barn. & Ald. 405.) This decision no doubt gave occasion for the enactment of the statute of 59th Geo. III, c. 46, by which this proceeding was abolished in England.

Vernon and Bassett, implore the right of trial by battle, in 1' Henry VI, as follows:

"*Ver.* Grant me the combat, gracious sovereign:
Bas. And me, my lord, grant me the combat, too.

. . . . . .

Stubbornly he did repugn the truth,
About a certain question in the law,

. . . . . .

And in defence of my lord's worthiness,
I crave the benefit of law of arms.

. . . . . .

York. Let this dissension first be tried by fight,
And then your highness shall command a peace."

(Act IV, Scene I.)

The following references to trial by battle, occur in 2' Henry VI, wherein Horner and his apprentice, Peter have such a trial:

"*Glo.* This doom, my lord, if I may judge.
. . . Let these have a day appointed them
For single combat in convenient place;
For he hath witness of his servant's malice:
This is the law, and this duke Humphrey's doom.

. . . . . .

Hor. And I accept the combat willingly.
Pet. Alas, my lord, I cannot fight; for God's sake, pity my case: the spite of man prevaileth against me. . . . . .

. . . . . .

York. . . Please it, your majesty,
This is the day appointed for the combat;
And ready are the appellant and defendant,
The armorer and his man to enter the lists,
So please your highness to behold the fight.
Q. Mar. Ay, good my lord; for purposely therefore
Left I the court to see this quarrel tried.
K. Hen. O, God's name, see the lists and all things fit:
Here let them end it and God defend the right.

. . . . . .

York. . . . Sound trumpets, alarum to the combatants.
(*Alarum. They fight and Peter strikes down his master.*)

Sec. 192. Party-verdict.—

"*K. Rich.* Thy son is banish'd upon good advice,
Whereto thy tongue a party-verdict gave."[1]

A party-verdict, is used in the sense of a partial verdict, no doubt, which is the special verdict on one charge or

---

Hor. Hold, Peter, hold; I confess, I confess treason. (*Dies.*)
York. Take away his weapon:—Fellow, thank God, and the good wine in thy master's way.
Peter. O God: Have I overcome mine enemies in this presence? O Peter, thou has prevailed in right.
K. Hen. Go, take hence, that traitor from our sight;
For, by his death, we do perceive his guilt;
And, God in justice hath reveal'd to us,
The truth and innocence of this poor fellow,
Which he had thought to have murder'd wrongfully.—
Come, fellow, follow us, for thy reward."
(Act I, Scene III; Act II, Scene III.)

The trial by battle is again shown in King Lear, when Edgar and his bastard brother, Edmund, try their cause by the wage of battle.

After the proclamation by the Herald for Edmund, Edgar appears, and the Herald asks him:

"*Her.* What are you? Your name, your quality? And why you answer this present summons.
Edg. Know my name is lost; By treasons tooth-bare gnawn, and canker-bit;
Yet am I noble as the adversary, I came to cope withal.
Alb. Which is that adversary?
Edg. What's he that speaks for Edmund earl of Gloster
Edm. Himself;—What say'st thou to him?
Edg. Draw thy sword. . . . . .
Edm. In wisdom, I should ask thy name;
But, since thy outside looks so fair and warlike,
And that thy tongue some'say of breeding breathes,
What safe and nicely I might well delay
By rule of knighthood, I disdain and spurn."
(Act V, Scene III.)

By the rule of knighthood, referred to, if the adversary was not of equal rank with the challeng'd one, the combat might be legally declined.

[1] King Richard II, Act I, Scene III.

count in a criminal case, returned by the jury, as where a verdict for the accused is found on part or some of the charges or counts in the indictment and a verdict against the accused in another form, by the same jury.[1] In other words, as Gaunt, himself had advised such a course, the verdict of banishment, the king maintains, was a verdict to which he gave his partial consent.

Sec. 193. Reversion.—

"*K. Rich.* . . . Off goes his bonnet to an oyster-wench;
A brace of draymen bid—God speed him well,
And had the tribute of his supple knee,
With—*Thanks my countrymen, my loving friends;*
As were our England, in reversion his,
And he our subjects next degree of hope."[2]

A reversion is the residue of an estate in lands, to commence in possession after the determination of a prior

---

[1] Arch. Cr. Pl. & Evid. 146, 147.

Vernon decided in favor of the white rose, in the controversy between Somerset and Richard Plantagenet, in 1' Henry VI, as follows: "*Ver.* Then, for the truth and plainness of the case, I pluck this pale and maiden blossom here, Giving my verdict on the white rose side." (Act II, Scene IV.)

Richard Plantagenet, in 1' Henry VI, speaking of the trouble between Gloster and the Bishop of Winchester, said: "*Plan.* Plantagenet, I see, must hold his tongue, lest it be said, *Speak, sirrah, when you should; Must your bold verdict enter talk with lords?*" (Act III, Scene I.)

A citizen, speaking of Caius Marcius, being an enemy of the people, in Coriolanus, said: "1 *Cit.* Let us kill him, and we'll have corn at our own price. I'st a verdict?" (Act I, Scene I.)

Describing her lover, the "fickle maid," narrated, in A Lover's Complaint:

"But quickly on this side the verdict went:
His real habitude gave life and grace
To appertainings and to ornament,
Accomplish'd in himself, not in his case." (113, 116.)

[2] King Richard II, Act I, Scene III.

particular estate in the same lands.[1] In other words, the estate left after the termination of a life estate or an estate for years in a given tract of land, is a reversion, and the estate arises by operation of law and not by deed or will, and it is in this that it differs from a remainder, which can only be limited by deed or will.[2]

The reversioner has the next right to the land, after the tenant of the term is through with the land, hence the reference to the kingdom, as vested in Bolingbroke, in reversion, and the reference to him as "our subjects next degree of hope."

Sec. 194. Waste upon real estate.—

"*Gaunt.* A thousand flatterers sit within thy crown,
Whose compass is no bigger than thy head;
And yet, encaged in so small a verge,
The waste is no whit lesser than the land."[3]

Waste is any damage or act which injures the inheritance of real estate done by a tenant for life or years, to the

---

[1] Tiedeman, R. P. (3d ed.), sec. 291.

[2] 2 Bl. Comm. 175; 4 Kent's Comm. 349.

In King Richard II, the Queen said to Bushy:
"*Queen.* 'Tis nothing less: conceit is still deriv'd
From some forefather grief; mine is not so;
For nothing hath begot my something grief;
Or something hath the nothing that I grieve;
'Tis in reversion that I do possess." (Act II, Scene II.)

Douglas said to Hotspur, in 1' Henry IV: "*Doug.* 'Faith and so we should Where now remains a sweet reversion." (Act IV, Scene I.)

In Troilus and Cressida, Troilus speaks of *Perfection in reversion*, as follows:

"*Tro.* . . . Praise us as we are tasted, allow us as we prove; our head shall go bare, till merit crown it; no perfection in reversion shall have a praise in present; we will not name desert, before his birth, and, being born his addition shall be humble." (Act III, Scene II.)

[3] Richard II, Act II, Scene I.

Sec. 193a. Dying declarations.—

"*Gaunt.* O, but they say the tongues of dying men
Enforce attention like deep harmony;
Where words are scarce, they are seldom spent in vain,
For they breath truth that breath their words in pain.
He that no more must say is listen'd more
Than they whom youth and ease have taught to gloze;
More are men's ends mark'd than their lives before."[1]

In these lines the poet expressed, in true legal fashion, the reason that makes that class of hearsay evidence, known as "dying declarations," competent, when repeated by those who wrote them down, or accurately took the words of the person, made under the sense of impending death, legal evidence, in courts of justice.[2]

Dying declarations, or those statements made in extremity, by a person near the point of death, when every worldly hope is gone, and likewise all motives of falsehood are forever at rest, are universally recognized as having such probative force, because made under such powerful considerations as to impell the truth, that courts, like all men, receive the statements as evidence of the fact referred to.[3]

This class of evidence is subject, of course, to certain

[1] Richard II, Act II, Scene I.

[2] This is the fourth exception to the rule excluding hearsay evidence as presented by Prof. Greenleaf. See Greenleaf, on Evidence, Vol. I; Wigmore, on Evidence, Vol. II. Judge Wigmore has a most instructive discussion on this subject in his recent excellent work on Evidence, to which the reader is referred.

[3] As said by Lord Chief Baron Eyre, "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath, in a court of justice." Greenleaf, Evidence *supra.*

legal limitations, which it is not necessary to present here, but the reason for the competency of such hearsay evidence, was clearly expressed by Shakespeare, in these lines, because, in law, "the tongues of dying men enforce attention," . . . "for they breath truth," and herein lies the reason for the legal exception excluding hearsay evidence in courts of justice.

Discussing the circumstantial guarantee of the reliability of such statements, arising from the solemnity of the situation, Judge Wigmore, referring specially to the fact that this rule was recognized by Shakespeare, before it came generally to be recognized as a rule of law, says: "All courts have agreed, with more or less difference of language, that the approach of death produces a state of mind in which the utterances of the dying person are to be taken as freed from all ordinary motives to misstate. The great dramatist expressed the common feeling, long before it was announced by judicial opinion."[4]

[4] II Wigmore, on Evidence, Sec. 1438, p. 1804.

"*Melun.* Have I not hideous death, within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here and live hence by truth?"

(King John, Act V, Scene 4.)

Horatio, in advising the Prince of Norway, of the message from dead Hamlet, is made to say:

"Of that I shall have also cause to speak,
And from his mouth whose voice will draw no more."

(Act V, Scene II.)

In placing the dead body of Paris, in the monument, Romeo is also made to ruminate that:

"How oft, when men are at the point of death
Have they been merry? which their keepers call
A lightning before death."

(Romeo and Juliet, Act V, Scene II.)

prejudice of the reversioner or heir.[1] A tenant who cuts down trees, without the consent of his landlord, or reversioner,[2] or one who opens mines,[3] or commits such like acts of injury to the inheritance, is held to commit waste thereon.

Gaunt meant to tell the King that in seeking loans from the rich nobles of the realm and granting them concessions therefor, he had wasted the realm, as it were, for waste may be permissive, as well as otherwise and the damage is just as great.

Sec. 195. Landlord.—

"*Gaunt.* . . . Landlord of England art thou now, not king:
Thy state of law is bondslave to the law."[4]

Landlord, in its popular meaning, is a term applied to one who owns lands and rents them out to others. In the strictly legal sense, at ancient common law, it was used to indicate the lord or proprietor of the land who, under the feudal system retained the right of absolute property in the soil, or who had the fee of the land, while his grantee only took the right of possession.[5]

Gaunt here accuses the king of being merely the lord paramount or proprietor of the kingdom, not its king, in the true sense, and leaves the impression that his subjects are but little better than vassals, who only have the right of possession of the soil, a condition that has subverted the law.

Sec. 196. Lease—Tenement.—

"*Gaunt.* . . . This land of such dear souls, this dear, dear land,
Dear for her reputation through the world,

---

[1] Tiedeman, R. P. (3d ed.).
[2] Tiedeman, R. P. (3d ed.).
[3] White, Mines & Mining Remedies.
[4] Richard II, Act II, Scene I.
[5] Coke, Litt. 46a; Taylor, Land & Ten., sec. 25.

Is now leased out (I die pronouncing it,)
Like to a tenement or pelting farm."[1]

A lease is a written contract whereby the possession and profits of lands, or of some produce therefrom, is granted either for life or a fixed term of years, or during the pleasure of the parties.[2]

A tenement in the law of real property, is anything of a permanent nature, which may be holden, as a house or homestead.[3]

A pelting-farm, was a farm yielding wool, from the skin or pelt of sheep or rams, hence was about the lowest order of tenements or farms leased at that day and time. In comparing the kingdom, which was being let or demised, to such a leasehold, the dying Gaunt clearly expresses his condemnation for the course pursued by the king.

Sec. 197. Possessed.—

"*K. Rich.* . . And for these great affairs do ask some charge,
Towards our assistance, we do seize to us
The plate, coin, revenues, and movables,
Whereof our uncle Gaunt did stand possess'd."[4]

A possessor, in the law of real property, is one who holds, detains or enjoys such property under a claim there-

---

[1] Richard II, Act II, Scene I.

[2] 5 Coke, 23b; Coke, Litt. 57, a.

[3] Coke, Litt. 6a; Bl. Comm. 17; Tiedeman, R. P. (3d ed.), sec. 6.

Gaunt further on, tells King Richard:

"*Gaunt.* . . . Why, cousin, wert thou regent of the world,
It were a shame to let this land by lease."
(King Richard II, Act II, Scene I.)

In The Rape of Lucrece, the Poet said:

"O, let it not be hild,
Poor women's faults, that they are so fulfill'd
With men's abuses; those proud lords to blame
Make weak-made women tenants to their shame."
(1257, 1260.)

[4] Richard II, Act II, Scene I.

to. In the law of real property the possessor thereof has the right to receive the profits, until a better adverse title has been established to such land, and this right is the right asserted by the king, as an incident to his possession, resulting from the confiscation of the property whereof his uncle Gaunt, "did stand possess'd."[1]

Sec. 198. Royalties.—

"*York.* . . Seek you to seize and gripe into your hands,
The royalties and rights of banish'd Hereford?
Is not Gaunt dead? and does not Hereford live?
Was not Gaunt just? and is not Harry true?
Did not the one deserve to have an heir?"[2]

A royalty, in the law of landlord and tenant, is a share of the product or profits of land, as part of the output from a mine,[3] reserved, by way of a rental, by the owner of the land for permitting another to use and enjoy it[4]

The duke of York here contends for the right of descent, recognized by the English law and of the right of Bolingbroke, as the heir to his deceased father, to inherit his land. It is presented, that there was no disloyalty, or attainder, which would destroy the right of descent, but both the ancestor and the heir were loyal subjects, which would give the heir a right of inheritance.

---

[1] 2 Bl. Comm. 116.

[2] King Richard II, Act II, Scene I.

[3] White, Mines and Mining Remedies, Chapter 12.

[4] *Ante idem.* Coke, Litt. 46b; 202a; Tiedeman, R. P. (3d ed.), Secs. 145, 149.

Speaking, to King Richard II, of the object of Bolingbroke's return, the Earl of Northumberland, said:

"*North.* His coming hither hath no further scope,
Than for his lineal royalties, and to beg,
Enfranchisement immediate on his knees."

(Act III, Scene III.)

Sec. 199.—Attorneys-General.—

"*York.* . . . If you do wrongfully seize Hereford's rights,
Call in the letters-patents that he hath
By his attorneys-general to sue
His livery, and deny his offer'd homage,
You pluck a thousand dangers on your head."[1]

An attorney-general is one elected or appointed to attend to all legal affairs of a state, nation or kingdom, with general authority in the premises, in all legal affairs.[2] The King, at English law, is the Lord paramount in whom abides the superior title to land and all citizens hold under him, in legal contemplation, in their estates, or ownership.[3] At feudal periods, when the owner died, his adult heirs, had to "sue livery," or claim a delivery to himself, as heirs of the father, of the land of which the latter died seized.[4] And this is the process that Shakespeare refers to in these lines, which the duke of York declares ought to be recognized, by the King.

Sec. 200. Letters-patent.—

"*York.* . . If you do wrongfully seize Hereford's rights,
Call in the letters patent that he hath
By his attorney-general to sue
His livery, and deny his offer'd homage,
You pluck a thousand dangers on your head."[5]

Letters-patent are so called, because they are not sealed up, but are granted open. They are letters from the Government or its representative, to convey the right to the patentee, as a patent for a tract of land, or to secure him a right that he already possessed, as a patent for a new invention or discovery. Letters patent are generally

[1] King Richard II, Act II, Scene I.
[2] Bouvier's Law Dictionary.
[3] Tiedeman R. P. (3d. ed.).
[4] Malone, Rolfe's Richard II, p. 194, notes.
[5] King Richard II, Act II, Scene I.

a matter of record and hence can be read by all persons, thus furnishing record evidence of the right secured thereby.[1]

The good duke of York here tells the king that if he confiscates the duke of Hereford's property, he must recall the letters-patent securing him the land he holds by right of homage and livery of seisin and thus do violence to the rights of citizens in the kingdom.

Sec. 201. Seize.—

"*K. Rich.* Think what you will; we seize into our hands,
His plate, his goods, his money and his lands."[2]

To seize, in the law, is the act of taking possession of the property of a person, condemned by the judgment of his sovereign or of a competent tribunal, to pay a sum of money, for which the property is taken.[3] The act of seizure may also be made because of the violation of some public law, by one qualified and competent to make such seizure, but the seizure of the king, in this instance, was contrary to law, as no attainder had lawfully been adjudged against Gaunt, nor his son, and the right of property, by virtue of the law, was thus denied the rightful owner.

---

[1] Bouvier's Law Dictionary.

Replying to the request of Suffolk and Norfolk to surrender his great seal, Cardinal Wolsey, in King Henry VIII, said: "*Wol.* That seal, you ask, with such a violence, the king, (Mine and your master,) with his own hand gave me: Bade me enjoy it with the place and honours, during my life; and, to confirm his goodness, tied it by letters patent: Now, who'll take it?" (Act III, Scene II.)

[2] King Richard II, Act II, Scene I.

[3] 2 Cranch, 87; Comyns Dig. C. 5.

In The Passionate Pilgrim, in narrating how Venus wooed Adonis, it is said:

"'Even thus,' quoth she, 'he seized on my lips,'
And with her lips on his did act the seizure." (XI, 9, 10.)

Sec. 202. Fine.—

"*Ross.* The commons hath he piled with grievous taxes,
And lost their hearts; the nobles hath he fin'd,
For ancient quarrels and quite lost their hearts."[1]

In the criminal law, a fine is any pecuniary punishment imposed by a lawful tribunal, upon a person convicted of some crime or misdemeanor.[2] The kind of fine referred to in this verse is that known at the ancient common law as a *fine le roy,* which was a sum of money that any one was compelled to pay the king for any contempt or offense. Any one committing a trespass or quarrelling or committing other misdemeanor, could be fined by the king therefor, and the fine thus exacted was called a *fine le roy.*[3]

Sec. 203. Repeal.—

"*Green.* . . . The banish'd Bolingbroke repeals himself,
And with uplifted arms is safe arriv'd
At Ravenspurg."[4]

A repeal is the abrogation or destruction of a law or decree by a competent authority.[5] When a law is repealed it leaves all the civil rights of the parties the same

---

[1] King Richard II, Act II, Scene I.

[2] Bacon, Abr. Fines and Amercements; Sheppard Touch. 2.

[3] Termes de la Ley; Cunningham, Law Dictionary.

Winchester replied to the Mayor of London, who was trying to command the peace, before the Tower, in 1' Henry VI, as follows: "*Win.* Here's Gloster, too, a foe to citizens: One that still motions war, and never peace, O'ercharging your free purses, with large fines; That seeks to overthrow religion." (Act I, Scene III.)

Speaking of the tumult over the birth of Queen Elizabeth, the Lord Chamberlain, in King Henry VIII, said: "*Cham.* As I live, If the king blame me for't, I'll lay ye all, by the heels, and suddenly; and on your heads Clap round fines, for neglect." (Act V, Scene III.)

[4] King Richard II, Act II, Scene II.

[5] Bouvier's Law Dictionary.

as if no such law or decree had been in force,[1] hence, the inference here is that Bolingbroke, by force of his own will and with strong arms had repealed the decree of banishment, and set aside the order for his banishment, by virtue of a power above that of the king's.

Sec. 204. Covenant.—

"*Boling.* . . . My heart this covenant makes, my hand thus seals it."[2]

A covenant, in the law of contracts, is an agreement entered into by deed, or contract under seal, whereby the promisor or covenantor promises the performance or non-performance of certain acts or that a given state of things does or does not exist, as in the contract is specified.[3]

Bolingbroke here makes his heart the party to the covenant or promise and seals it, with his hand, as all such covenants were, by law, required to be sealed, to give the covenant validity.[4]

Sec. 205. Breaking laws.—

"*York.* It may be, I will go with you:—but yet, I'll pause,
For I am loath to break our country's laws."[5]

This respect for the law, shown by the duke of York, is worthy the emulation of the most respected citizens, for

---

[1] Bacon, Abr. (Statute, D.)

[2] King Richard II, Act II, Scene III.

[3] Bacon, Abr. Covenant, B; Rawle, Cov. 364; 4 Kent's Comm. 473.

[4] 3 Coke, Inst. 169.

Warwick said to the duke of York, in 1' Henry VI: "*War.* Be patient, York; if we conclude a peace, It shall be with such strict and severe covenants, As little shall the Frenchmen gain thereby." (Act V, Scene IV.)

King Henry VI, tells Suffolk, in regard to his marriage with Margaret: "*K. Hen.* . . post, my lord, to France; Agree to any covenants." (Act V, Scene V.)

[5] King Richard II, Act II, Scene III.

by strict adherence to law alone can the mandates of the law be maintained. In the broader sense, law is the aggregate of the rules of conduct to keep the members of society within the proper limits.[1] In its analysis, it may include adherence to rules for the protection of the person or the property of the member who invokes the law, or it may apply to the class of public wrongs known as crimes; but in either case, it is the same law, requiring the same obedience and this obedience to the law which York recognizes as the first duty of citizenship, shows that York spoke with a deep knowledge of the underlying duty of the citizen.

Sec. 206. Livery.—

"*Boling.* . . . I am denied to sue my livery here,
And yet my letters-patent give me leave."[2]

Livery as here used, referred to the writ known at the common law, which the heir, on arrival at his majority, had the right to sue out, to obtain the possession of the seisin of his lands, at the hands of the king.[3] The king was regarded as the absolute owner of the soil and the rights of the lords to hold the land was mediately or immediately from the sovereign, hence, when a new tenant of the freehold, by descent, desired to possess his land, he had to do so by sueing out livery.[4] Bolingbroke com-

[1] 2 Bentham, 402-407.

The servant, in the Duke of York's garden, is made to say: "1 *Serv.* Why should we, in the compass of a pale,
Keep law and form and due proportion,
Showing, as in a model, our firm estate?"
(King Richard II, Act III, Scene IV.)

The Duke of Gloster replied to Cardinal Winchester, in 1' Henry VI, as follows: "*Glo.* Cardinal, I'll be no breaker of the law: But we shall meet and break our minds, at large." (Act I, Scene III.)

[2] King Richard II, Act II, Scene III.

[3] 2 Bl. Comm. 68.

[4] Tiedeman, R. P. (3d ed.), Chap. III, The Feudal System.

plains that this common law right was denied him, in the face of his letters-patent, which gave and secured to him this right.

Sec. 207. Attorneys.—

"*Boling.* . . . What would you have me do? I am
a subject,
And challenge law: Attorneys are denied me;
And therefore personally I lay my claim
To my inheritance of free descent."[1]

Attorneys are those put in the place, stead or turn of another, to manage his affairs, or some particular affair, by direction of the principal.[2] The right of appearing by attorney was a right given all citizens at common law, for Lord Coke says: "All persons who are capable of acting for themselves and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of proper age, may act by attorneys."[3]

Bolingbroke invokes the law of descent, as recognized in England, and being denied attorney to present his cause, he appears in person, as he had a right to do.

In 1' Henry IV (Act IV, Scene III) Hotspur thus explains his father's former friendship for the king:

"*Hotspur.* . . . My father gave him welcome to the shore;
And when he heard him swear and vow to God
He came but to be Duke of Lancaster,
To sue his livery and to beg his peace,
With tears of innocency and terms of zeal,
My father, in kind heart and pity mov'd,
Swore him assistance and perform'd it too."

[1] King Richard II, Act II, Scene III.

[2] Spellman, Gloss; Bacon, Abr. *Attorney.*

[3] Coke, Litt. 52 a.

Referring to the wordy abuse of Queen Margaret, after the death of her sons, Queen Elizabeth observed, in King Richard III:

"*Q. Eliz.* Windy attorneys to their client woes,
Airy succeeders of intestate joys,
Poor breathing orators of miseries." (Act IV, Scene IV.)

In attempting to woo his own niece, through her mother, Richard III said to her mother: "*K. Rich.* Therefore, dear

Sec. 208. Executors.—

"*K. Rich.* . . . Let's talk of graves, of worms and epitaphs;
Make dust our paper, and with rainy eyes,
Write sorrow on the bosom of the earth.
Lets choose executors and talk of wills;
And yet, not so,—for what can we bequeath,
Save our deposed bodies to the ground."[1]

An executor is one to whom another commits by his last will, the execution of his will and testament.[2] An executor has authority over the personal estate of the decedent and it is his duty to dispose of the personal estate and pay the legacies and bequests bequeathed by the testator. If there was no property owned by the testator, of course there would be no duty to be performed by an executor, hence the King concludes, as he has nothing to bequeath, such an appointment is useless.

Sec. 209.—Failure to speak, in criminal case—Standing mute.—

"*Queen.* O, I am pressed to death,
Through want of speaking."[3]

This line no doubt refers to the ancient practice at the common law, when a prisoner charged with treason, lar-

---

mother, (I must call you so,) Be the attorney of my love to her." (Act IV, Scene IV.)

Stanley thus greets Richmond, in King Richard III: "*Stan.* I, by attorney, bless thee from thy mother, Who prays continually for Richmond's good." (Act V, Scene III.)

[1] King Richard II, Act III, Scene IV.

[2] 1 Williams, Exec. 185; 9 Coke 88; Coke, 2nd Inst. 236.

Grandpre, the French lord, before the battle of Agincourt, said of the English: "*Grand.* . . their executors, the knavish crows, fly o'er them all, impatient for their hour." (Henry V, Act IV, Scene II.)

[3] King Richard II, Act III, Scene IV.

ceny, or other felony, stood mute and refused to plead or answer to the charge and state whether he was guilty or not guilty.

According to the ancient books, he was not taken as confessing to the crime, in case the offense was treason, or such high felony, but by way of punishment for his obstinacy in thus standing mute, he was confined to a low, dark chamber in the prison and with his body naked and outstretched, a great iron weight was placed upon him and thus he was so pressed without food, except bread and water, he either died, or answered to the charge against him.[1]

The effect of standing mute was thus to press the life out of the prisoner by such practice and hence the Queen, "Through want of speaking," claimed that she was literally "pressed to death."

---

[1] Fleta, lib. 1, c. 34, sec. 33; Brit. C. C. 4, 22.

This inhuman practice was abolished by statute in England, in 2 Geo. III, c. 20. It seems strange that with advancing civilization, such terrible things were countenanced by the law until such modern times.

Pandarus, refers to this barbarous custom of the English courts, in advising Troilus and Cressida to press the bed to death, because it "stands mute," as to their "pretty encounters," thereon, in Troilus and Cressida, as follows: "*Pan.* . . . I will show you a chamber and a bed, which bed, because it shall not speak of your pretty encounters, press it to death: away." (Act III, Scene II.)

On arraignment of a prisoner, under the old English Common Law, he was enjoined to hold up his right hand, by which act he admitted that he was the person named in the indictment. The Clerk then asked him: "Are you guilty or not guilty?" If he answered "Not guilty" he was then asked: "Culprit, how will you be tried," and the prisoner replied: "By God and my country," when the Clerk retorted, "God send you a good deliverance," and the trial then proceeded.

If the accused refused to or did not speak at all, he was said to "stand mute," and in treason or a misdemeanor, his silence was a confession of guilt, but if the offense was a felony, the Court determined, officially, if the standing mute was "of malice,"

Sec. 210. Signories.—

"*Boling.* These differences shall all rest under gage,
Till Norfolk be repealed: repealed he shall be,
And, though mine enemy, restored again
To all his land and signories; when he's return'd
Against Aumerle we will enforce his trial."[1]

Signories is here used in the sense of the land or territory over which the lord holds jurisdiction, by virtue of his recognition as the owner of such land, by his sover-

---

or by "visitation of God," and, if the latter, the trial proceeded; but, if the former, the culprit was pressed to death, by a heavy weight, if he or she continued to stand mute.

Many cases are reported where this barbarous treatment was accorded defendants who refused to plead. Margaret Clitherow, a married woman, under a felony charge, who refused to plead, was pressed to death, at York, on Lady Day, March 25th, 1586, She was given different opportunities to plead but persisting in her stubbornness, was disrobed and placed on her back and a heavy door was placed upon her, with weights, which broke her ribs and mashed her to death.

Major Strangeways arraigned, in 1658, for the murder of his brother-in-law, refused to plead, to avoid forfeiture of his estate on his conviction. The weight was placed upon him angle-wise and not being sufficient to kill him outright, the bystanders added their weight and ended his misery.

In 1726, a man named Burnworth, refused to plead to the charge of murder, but after being press'd for an hour or so, with four hundred weight of iron, he recanted and entered his plea and was convicted and hanged. This practice was called *peine forte et dure*. The punishment was established during the reign of Henry IV, in the 15th century and continued until 1772, when by statute, (12 Geo. III, c. 20.) standing mute in felony was made equivalent to a conviction. But in 1827, by statute, (7 and 8 Geo. IV, c. 28) a plea of not guilty was entered for one standing mute, for any cause, and this more humane practice continues to the present day.

(See article by Francis Watt, The Law's Lumber Room, published by John Lane, London, also in 14 Law Notes, pp. 31, 33, for May 10th, 1910.)

[1] King Richard II, Act IV, Scene I.

eign.[1] It is essentially a right or thing claimed or taken by virtue of a sovereign prerogative.

Bolingbroke declares that he will so far forgive his enemy Norfolk as to recognize his landed rights by the repeal of the decree for his banishment and to let his titles rest undisputed, until his trial, by battle, against Aumerle, after his return.

Sec. 211. Under gage.—

"*Boling.* . . . Lords appellants, your differences
shall all rest under gage,
Till we assign you to your days of trial."[2]

A gage is something given as a security or by way of pledge for the performance of a given act by the person entering into the gage, which is forfeited for failure to perform, as per agreement.[3] In other words, the king here declares that until the day of trial, each shall be under surety for his appearance at the trial by battle and until that time the rights of all parties shall stand in *statu quo*.

Sec. 212. Day of trial.—

"*North.* Well have you argu'd sir; and, for your pains,
Of capital treason we arrest you here:—
My lord of Westminster, be it your charge
To keep him safely till his day of trial."[4]

A trial is the examination, before a competent tribunal, according to law, of the facts put in issue in a cause, for

---

[1] 2 Bl. Comm. 438.

Westmoreland replies to Lord Mowbray, in 2' Henry IV, as follows: "*West.* . . . Were you not restor'd to all the duke of Norfolk's signories, your noble and right well remember'd father?" (Act IV, Scene I.)

[2] King Richard II, Act IV, Scene I.

[3] Granville, lib. 10, c. 6.

[4] King Richard II, Act IV, Scene I.

the purpose of determining such issue or issues.[1] As a trial is usually had by witnesses and this necessitates time to get the evidence at hand, a "day of trial" is usually set and upon that day the issues are decided upon the evidence submitted.[2]

Sec. 213. Answer.—

"*Boling.* Lords, you that are here under our arrest,
Procure your sureties for your days of answer."[3]

An answer is a defense in writing made by a defendant to the charge contained in a bill, or information filed against him, in a suit pending in court.[4] An answer is generally required to meet the charges of the bill or information filed and to contain matters of fact, not arguments or irrelevant matter, without repetition or undue prolixity. The lords here arrested were required to furnish sureties for their appearance at the day of trial, which is referred to as the day of answer.

Sec. 214. Crimes.—

"*North.* No more, but that you read,
These accusations and these grievous crimes,
Committed by your person and your followers,
Against the state and profit of this land;
That, by confessing them, the souls of men
May deem that you are worthily deposed."[5]

A crime is a wrongful act which the Government notices and punishes because it is injurious to the public.[6]

[1] 9 Coke, 30; 3 Bl. Comm. 331; 3 Bl. Comm. 333.

[2] Originally a trial at *nisi prius*—where issues of fact were determined—was before a justice in eyre, but afterwards, by statute of Westminster, (13 Edw. I, c. 30) the trial was had before a justice of assize. (3 Sharsh. Bl. Comm. 353.)

[3] King Richard II, Act IV, Scene I.

[4] 2 Brown, Civ. Law, 371n.

[5] King Richard II, Act IV, Scene I.

[6] 1 Bishop, Cr. Law, Sec. 43.

The word crime, as distinguished from a misdemeanor, generally denotes an offense of a deep and atrocious character, when compared with those of lesser degree, commonly called misdemeanors.[1]

It was the deepest despair to compel the wronged king, after his subjection, to publicly proclaim himself a criminal and to renounce his kingdom, for the reason that it was essential for him to do so to convince the populace that his abdication was proper, but such was the punishment inflicted for his irregularities, which are here denominated crimes against the law.

Sec. 215. Manors.—

"*K. Rich.* . . . My manors, rents, revenues, I forego;
My acts, decrees and statutes, I deny."[2]

A manor, derived from the French *manoir,* signifies a house, residence or habitation. At the common law, the meaning of the term had a broader signification and included not alone the house, or dwelling but the land surrounding it, as well, which was held through or by the king, or other person of rank.[3]

---

[1] 4 Bl. Comm. 4.

Gloster is made to say to the Bishop of Winchester, in 1' Henry VI:

"*Glo.* The manner of thy vile outrageous crimes,
That therefore I have forg'd, or am not able
Verbatim to rehearse the method of my pen."
(Act III, Scene I.)

Lucrece complains at the night of her great wrong:

"'O hateful, vaporous and foggy night:
Since thou art guilty of my cureless crime,
Muster thy mists to meet the eastern light,
Make war against proportion'd course of time." (771, 774.)

[2] King Richard II, Act IV, Scene I.

[3] Coke, Litt. 58, 108; 2 Rolle, Abr. 121.

No new manors were created in England after the enactment of the statute *Quia Emptores*, forbidding subinfeudation, in the year 1290. Tiedeman, on R. P. (3d ed.), Secs. 22-31.

The king here, in his abdication foregoes his manors, rents and revenues and also in his dejection denies his acts, decrees and statutes.

Sec. 216. Conspiracy.—

"*York.* Thou fond, mad woman,
Wilt thou conceal this dark conspiracy?"[1]

A conspiracy is a combination of two or more persons to accomplish by some concerted action, some criminal purpose, or to accomplish some purpose, not in itself criminal, by some criminal or unlawful means.[2] A treasonable design to overthrow the king and re-instate another in his place, entered into by several people, would come within the legal definition of the term, and this is why the duke of York is struck with the mad act of his wife, in her attempt to concel such a dark crime.

Speaking of the expense incurred in the pageant, by which the French treaty was ratified, Buckingham, in King Henry VIII, said: "*Buck.* O many have broke their backs with laying manors on them for this great journey." (Act I, Scene I.)

[1] King Richard II, Act V, Scene II.

[2] 2 Bishop, Cr. Law, Secs. 149-202.

Speaking of the treason of the earl of Cambridge, Henry V, said: "*K. Hen.* . . and this man, hath for a few light crowns, lightly conspir'd, and sworn unto the practices of France, to kill us here in Hampton." (Act II, Scene II.)

In 1' Henry VI, the duke of Gloster said to Winchester, before the Tower:

"*Glo.* Stand back, thou manifest conspirator,
Thou that contriv'dst to murder our dead lord."
(Act I, Scene III.)

York thus addresses Henry VI, in 3' Henry VI: "*York.* Henry of Lancaster, resign thy crown:—What mutter you, or what conspire you, lords?" (Act I, Scene I.)

On the entering of the conspirators, in Julius Cæsar, Brutus said:

"*Bru.* O conspiracy:
Sham'st thou to show thy dangerous brow by night,
When evils are most free? O, then, by day,
Where wilt thou find a cavern dark enough
To mark thy monstrous visage? Seek none, conspiracy;
Hide it in smiles, and affibility;
For if thou path thy native semblance on,
Not Erebus itself were dim enough
To hide thee from prevention." (Act II, Scene I.)

Octavius Cæsar tells Cassius, before the battle of Philippi:

"*Oct.* I draw a sword against conspirators;
When think you that the sword goes up again?—
Never, till Cæsar's three and twenty wounds, be well aveng'd."
(Act V, Scene I.)

CHAPTER XVIII.

"FIRST PART OF KING HENRY THE FOURTH."

Sec. 217. King's right to prisoners, under military Law.
218. "The Law's Delay."
219. "Peaching" on accomplice.
220. Righting Grand-jurors.
221. *Audi alteram partem.*
222. Term of apprentice.
223. Arrest upon "hue and cry."
224. Robbery.
225. Tripartite agreements.
226. Enfeoffment.
227. Alien.
228. Factor—Broker.
229. Maiming.
230. Reprisal.
231. Counterfeit.
232. Death by Judicial Sentence.

Sec. 217. King's right to prisoners, under military law.—

"*King.* . . . What think you coz,
Of this young Percy's pride? the prisoners
Which he in this adventure hath surpris'd
To his own use he keeps, and sends me word
I shall have none but Mordake earl of Fife."[1]

This has reference to the right of the King, by virtue of his prerogative, to the prisoners taken in battle by his forces. "According to Tollet, Hotspur had a right to all the prisoners, except the earl of Fife. By the law of arms, a man who had taken any captive, whose ransom did not exceed ten thousand crowns, had the control of him. The earl of Fife, being a prince of the blood royal, (the Duke of Albany, his father, was brother to King Robert III) could be claimed by Henry, by his acknowledged military prerogative."[2]

[1] 1' Henry IV, Act I, Scene I.

[2] Rolfe's First part of King Henry IV, p. 164, notes.

Sec. 218. "The law's delay."—

"*Fal.* Well, Hal, well; and in some sort it jumps with my humour, as well as waiting in the court, I can tell you.
P. Hen. For obtaining of suits?
Fal. Yea, for obtaining of suits: whereof the hangman hath no lean wardrobe."[1]

In the present day, when people are so much concerned about the "law's delay,"[2] it is interesting in the extreme to see that Shakespeare also noted this defect in the judicial system of England, in his day. Then, as now, to command the respect of the people it was true that the law should be not only impartially and honestly enforced, but that justice should be likewise speedy in its results. Respect for the law and a complete reliance thereon, for the protection of the personal and property rights of the citizen is essential in every government and the power and majesty of the law should be instilled into the minds of the youth of all civilized states, as a cardinal principal of government. But while this is indisputable, it is none the less true that to commend itself to the people, not only the law, but its administration must be enforced in a manner to commend it to the people and unless this is done, there is grave danger of a widespread distrust of the remedies provided for the enforcement of the rights of citizens. As a usual thing there is no discussion or agitation without a just cause, and the present and long continued discussion of the subject of the "law's delay" would seem to merit due attention by the framers of constitutions and the architects of the judicial departments of States, lest the dangers from such continued agitation bring about worse results than an amendment of the remedial procedure, used to enforce the laws, will justify.

[1] 1' Henry IV, Act I, Scene II.

[2] See Article "The Law's Delay," by Hon. Frank B. Kellogg, published in "Comment," a legal publication, p. 126, for October, 1909.

Sec. 219. "Peaching" on accomplices.—

"*Fal.* Go, hang thyself in thy own heir-apparent garters: If I be ta'en I'll peach for this."[1]

In Hamlet, also, Shakespeare names the "Law's delay" as one of the ills of life rather to be borne "than fly to others we know not of."

"*Hamlet.* For who would bear the whips and scorns of time,
The pangs of dispriz'd love, the law's delay,
When he himself might his quietus make, . . .
But that the dread of something after death,
The undiscovered country from whose bourn
No traveller returns, puzzles the will,
And makes us rather bear those ills we have
Than fly to others that we know not of."
(Hamlet, Act III, Scene I.)

Thus, the "law's delay" was one of the social evils recognized in the time of Shakespeare.

King Henry thus tells Exeter, in 3' Henry VI: "*K. Hen.* I have not stopp'd mine ears to their demands, Nor posted off their suits with slow delays." (Act IV, Scene VIII.)

Complaining of the delay in securing his divorce, from Katherine, King Henry VIII, said: "*K. Hen.* These cardinals trifle with me: I abhor the dilatory sloth, and tricks of Rome." (Act II, Scene IV.)

Cardinal Campeius, in King Henry VIII, urged speedy trial and argument of the divorce suit, between Henry and Catherine, as follows: "*Cam.* And that, without delay, their arguments, Be now produc'd and heard." (Act II, Scene IV.)

Speaking of the delayed justice of the Gods, in Antony and Cleopatra, Menecrates is made to say, to Pompey:

"*Mene.* Know, worthy Pompey,
That what they do delay, they not deny.
Pom. Whiles we are suitors to their throne, decays
The thing we sue for." (Act II, Scene I.)

In King Lear, Albany speaks of the "nether crimes," that can "so speedily" be venged. (Act IV, Scene II.)

The King, in Hamlet, speaks of the law's delays as follows:

"We should do when we would; for this *would* changes,
And hath abatements and delays as many,
As there are tongues, are hands are accidents."
(Act IV, Scene VII.)

[1] 1' Henry IV, Act II, Scene II.

"Peaching" is the common term applied, at criminal law, to the act of turning informer against one's accomplices, or co-conspirators, in the commission of a crime, to free the one giving the evidence from the punishment for the crime committed.[1] The same act is ofttimes spoken of as "turning state's evidence," whereby is meant that the criminal who divulges the evidence to the State, does so, in consideration of his acquittal, thus enabling the State to convict his accomplices, or associates in crime.

Sec. 220. Righting grandjurors.—

"*Fal.* Hang ye, gorbellied knaves, are ye undone? No, ye fat chuffs; I would your store were here: On, bacons, on: What, ye knaves: young men must live. You are grandjurors, are ye? we'll jure ye, i'faith."[2]

A grandjuror, in the time of Elizabeth, had to be possessed of a freehold estate, of the yearly value of four pounds[3] and Falstaff's calling the travelers by this name is a recognition that he considered them men qualified to sit upon the grand-jury and indict him and his associates for the offense they were committing.[4] Jurors are those citizens selected to enforce the "rights" of litigants in courts, and grand-jurors are those men selected by the English courts, to take cognizance of the higher crimes and prefer indictments charging the offenders therewith in open court.[5] "Jure" is the Latin word for "right," and Falstaff's play upon the word, meaning that he'd

[1] The above line is the illustration, used by Mr. Webster, by way of illustration of the meaning of the term defined in his dictionary.

[2] 1' Henry IV, Act II, Scene II.

[3] V Reeve's History Eng. Law.

[4] Doctor Rolfe thinks he intentionally misunderstood the travelers when they said "we are undone, we and ours forever," but this is not apparently borne out by the language or context of the reply by Falstaff. (Rolfe's 1' part of King Henry IV, p. 191.)

[5] Thompson, Trials.

"right" the travelers, by robbing them, is a declaration that their functions as such court officers, could not be performed around him.

Sec. 221. Audi alteram partem.—

"*P. Hen.* Mark now, how plain a tale shall put you down."[1]

To those accustomed by experience and discipline to a patient examination of both sides of a controversy, before reaching a conclusion, the above line, suggests the maxim —*audi alteram partem*—hear the other side, for the story of the robbery, as detailed by Falstaff, had two sides, and the version as given by Sir John could not stand alongside that of the Prince.

This line suggests the natural bent of the lawyer's mind, for, as observed by Ram, on Facts: "A tendency to suspend his judgment on hearing one side only of a case, can scarcely fail to be the result of an advocate's practice. On any question, in any transaction of life, in which there may be opposite sides taken, he, having heard one side only, is sure to enquire what can be said on the other; it instantly occurs to him to say *audi alteram partem.*"[2]

Sec. 222. Term of apprentice.—

"*P. Hen.* How long hast thou to serve Francis?
Fran. Forsooth, five year, and as much as to——
. . . . . .

P. Hen. Five years: by'r lady, a long lease for the clinking of pewter. But, Francis, darest thou be so valiant as to play the coward with thy indenture, and to show it a fair pair of heels, and run from it?"[3]

That the above colloquy has reference to the common law contract of apprenticeship, there can be no doubt. By

[1] 1' Henry IV, Act II, Scene IV.
[2] Ram, on Facts, (Am. Ed.) p. 270.
[3] 1' Henry IV, Act II, Scene IV.

such a contract the person bound himself in due form of law to a master to learn from him his art, trade or business, and to serve him during the time of his apprenticeship.[1] At the common law, because the contract was deemed for the benefit of the infant, even an infant, who was otherwise held incompetent to make a valid or binding contract, was held bound by his contract of apprenticeship.[2] The apprentice was bound at law, to obey the master, during his service and could not legally leave his service during the term for which he was apprenticed.[3]

Such contracts were generally in the form of an indenture, and the Prince in urging Francis to "play the coward with thy indenture," was an attempt to get him to violate the law and leave during his term of service as an apprentice.

---

[1] Bacon, Abr., Master and Servant; 2 Kent's Comm. 261-266.
[2] Coke, 2' Inst., 214; 1 Bl. Comm. 426.
[3] 6 Johns (N. Y.) 274.

Both in England and in the United States, at the present day, on account of the abuse resulting from such contracts, they are not generally upheld, without the ratification or consent of the parent or guardian of the infant apprentice.

Speaking of the descent from a Prince to an Apprentice, Prince Henry, in 2' Henry IV (Act II, Scene II) observed: "*P. Hen.* From a god to a bull? a heavy descension: it was Jove's case. From a prince to a 'prentice? a low transformation—that shall be mine."

Replying to the accusation of his apprentice, Horner said, in 2' Henry VI: "*Hor.* . . My accuser is my 'prentice; and when I did correct him for his fault the other day, he did vow upon his knees he would be even with me." (Act I, Scene III.)

The Prince may have referred to the statute, 23 Edw. III, c. 2, making it a crime for any apprentice, workman or servant, to depart from his service before the time agreed upon. (III Reeve's History Eng. Law, p. 129.)

Sec. 223. Arrest upon "hue and cry."—

"*Sher.* First, pardon me, my lord. A hue and cry hath followed certain men unto this house."[1]

A "hue and cry" was the pursuit of one who had committed felony, by the highway and the right of private citizens to arrest the felon, on "hue and cry" was established at common law.[2] A person engaged in the "hue and cry" apprehending the felon, on his conviction, was entitled to forty pounds, on certificate of the judge or justice where the trial was had, as well as to the goods, horse, or money, taken with the felon, subject to the rights of other persons in the property claimed.[3]

The offense committed here, i. e., that of robbery, was the first offense mentioned in the statute wherein arrest upon "hue and cry" was authorized.[4]

Sec. 224. Robbery.—

"*Sher.* I will, my lord: There are two gentlemen have in this robbery lost three hundred marks.

---

[1] 1' Henry IV, Act II, Scene IV.

[2] 2 Hale, 100.

[3] Wood, Inst., 370-373.

[4] There is mention of the "hue and cry" as early as the reign of Edward I and by the statute of Winchester (13 Edw. I) it was provided that: "Immediately upon robberies and felonies committed, fresh suit shall be made, from town to town, and county to county, by horsemen and footmen, to the seaside. The constable is to call upon the parishioners to assist him in his precinct and to give notice to the next constable, who is to do the same as the first, etc., and if the counties will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed."

The former statutes as to "hue and cry," because of the abuse and hardships resulting from the enforcement of the penalty against the hundred made liable for the failure to arrest the felon, were amended during the reign of Elizabeth, by 27 Elizabeth, c. 13, so as to make the inhabitants of the hundred where there was any negligence, in making the arrest, liable for a moiety of the damages, to be recovered by the clerk of the peace. (V Reeve's Hist. Eng. Law, pp. 355-361.)

P. Hen. It may be so; if he have robbed these men,
He shall be answerable; and so, farewell."[1]

Robbery is the felonious and forcibly taking from the person of another, of any goods, or money, either by violence or putting him in fear of violence.[2] At the common law, robbery was therefore, the larceny from the person, accomplished by putting the person robbed in fear of violence.[3] Falstaff and his companions had committed robbery upon the persons of the travelers in unlawfully taking from their persons the three hundred marks, mentioned by the Sheriff and under the law they were subject to indictment therefor.

Sec. 225. Tripartite agreements.—

"*Mort.* . . . And our indentures tripartite are drawn:
Which being sealed interchangeably,
(A business that this night may execute) etc."[4]

A tripartite agreement or contract is one consisting of three parts, intended for as many persons, as where three persons execute the contract and each takes a copy, which

---

[1] 1' Henry IV, Act II, Scene IV.

[2] 4 Bl. Comm. 243.

[3] Sherwood Cr. Law, 200.

In 2' Henry IV, the Chief Justice is enquiring about Falstaff, and his connection with the robbery on Gadshill, as follows:

"*Ch. Jus.* He that was in question for the robbery?

Atten. He, my lord; but he hath since done good service at Shrewsbury," etc. (Act I, Scene III.)

In the XXXVI' Sonnet, after confessing that the plea of sensuality is properly urged against himself, the Poet said:

"That I an accessary needs must be
To that sweet thief which sourly robs from me." (13, 14.)

The Poet forgives the "gentle thief" who steals his strength through sensuality, in the XL' Sonnet, in these lines:

"I do forgive thy robbery, gentle thief,
Although thou steal thee all my poverty." (9, 10.)

[4] 1' Henry IV, Act III, Scene I.

is made and marked as the original.[1] The term also applies to a deed or indenture, as here used and as such an instrument had to be sealed, it was speaking in strict legal parlance to refer to the execution of such indenture as "being sealed interchangeably."

Sec. 226. Enfeoffment.—

"*K. Hen.* . . . The skipping king, he ambled up and down,
With shallow jesters and rash bavin wits,
. . . . . .
Grew a companion to the common streets,
Enfeoff'd himself to popularity."[2]

A "feoffment" or "enfeoffment," at common law, was a gift of any corporeal hereditament to another and it operated by transmutation of possession, it being essential that the seisin be passed. In other words, it was the instrument or deed of conveyance, by which the hereditament passed, either by investiture or by livery of seisin.[3]

This was one of the earliest modes of conveyance used at common law and while it signified originally the grant of a feud or fee, it later came to signify the grant of an inheritance in fee, the character of the conveyance being devoted rather to the perpetuity of the estate granted than to the feudal tenure.[4] The King here intimates that King Richard had devoted himself to making himself popular, without reservation of the principles of manhood, or anything else. In the Poet's words he had literally, "Enfeff'd himself to popularity."

---

[1] Bouvier's Law Dictionary; Lawson on Con. (2d ed.) 415.
[2] 1' Henry IV, Act III, Scene II.
[3] Tiedeman, R. P. (3d ed) Secs. 24, 536.
[4] I Reeve's Hist. Eng. Law, 90.

The conveyance by feoffment has become obsolete in England now and in this country has not been used in practice. Tiedeman, on R. P. (3d ed.), Secs. 24, 536; Bacon, Abr.; Sheppard, Touch. c. 9; Coke, Litt. 9; 4 Kent's Comm. 467.

Sec. 227. Alien.—

"*K. Hen.* . . Thy place in council thou hast rudely lost,
Which by thy younger brother is supplied,
And art almost an alien to the hearts
Of all the court and princes of my blood."[1]

An alien is a foreigner, or one of foreign birth and in England one born out of the allegiance of the king was deemed a foreigner.[2] An alien in most countries is barred from holding real estate either by descent or by operation of law and, at common law, if he purchased land, he was liable to be dispossessed, upon office found.[3]

Sec. 228. Factor.—Broker.—

"*P. Hen.* . Percy is but my factor, good my lord,
To engross up glorious deeds on my behalf;
And I will call him to so strict account,
That he shall render every glory up."[4]

A factor is an agent, employed to sell goods or merchandise for his principal, for a compensation, commonly called factorage or commission.[5] One of the first duties of a factor—like any one else standing in such fiduciary relation—is to render a just account to the principal of all his dealings for him, and to pay him the money he may receive for him.[6] Prince Henry was clearly right when treating Hotspur as his factor, to say that "I will call him to a strict account."

---

[1] 1' Henry IV, Act III, Scene II.

[2] Bouvier's Law Dictionary

[3] 2 Kent's Comm. 50; 7 Coke, 25 a. Of course the disability of aliens is removed by treaty with the United States and by most of the different states in this country, by statute.

[4] 1' Henry IV, Act III, Scene II.

[5] Story, Agency, sec. 268; Paley, Agency, 243.

[6] 3 Chitty, Com. Law, 193; 2 Kent's Comm. (3d ed.) 622.

Clarence tells King Edward, in 3' Henry VI: "*Clar.* In choosing for yourself, you show'd your judgment; Which, being shallow, you shall give me leave, To play the broker in mine own behalf." (Act IV, Scene I.)

Sec. 229. Maiming.—

"*Wor.* Your father's sickness is a maim to us.
Hot. A perilous gash, a very limb lopp'd off."[1]

"Maim," in the criminal law, is to deprive a person of such part of his body as to render him less able in fighting or defending himself than he would otherwise have been, if not so deprived.[2]

The true meaning of the term is clearly implied by the verse quoted, as the absence and sickness of the Earl of Northumberland is compared to a vital part of the body necessary to be used in fighting and this meaning

---

In the farce wherein Buckingham urges Gloster to accept the crown, in King Richard III, the Poet makes the former say: "*Buck.* . . . Not as protector, steward, substitute, Or lowly factor for another's gain; . . . . In this just suit, come I to move your grace." (Act III, Scene VII.)

Pandarus tells Troilus and Cressida, after ratifying their precontract of marriage: "*Pan.* Let all inconstant men be Troiluses, all false women Cressids, and all brokers-between Pandars." (Act III, Scene II.)

After discovery of Cressida's perfidy, Troilus tells Pandarus, who had brought them together, in Troilus and Cressida: "*Tro.* Hence, broker lackey: ignomy and shame pursue thy life, and live aye, with thy name." (Act V, Scene XI.)

Iachimo, in Cymbeline, refers to himself, in his talk with Imogen, in falsely reporting a purchase for the Emperor, wherein he had acted as "the factor for the rest." (Act I, Scene VII.)

Polonius tells Ophelia, in Hamlet:

"*Pol.* . . In few, Ophelia,
Do not believe his vows: for they are brokers,
Not of that die which their investments show,
But mere implorators of unholy suits,
Breathing like sanctified and pious bonds,
The better to beguile." (Act I, Scene III.)

The maid, in A Lover's Complaint, complained of her false lover that "deceits were gilded in his smiling," and . . "vows were ever brokers to defiling." (172, 173.)

[1] 1' Henry IV, Act IV, Scene I.

[2] Chitty, Cr. Law, 244; Sherwood Cr. Law, Ch. 23.

is enlarged upon by Hotspur, as likening him to "a very limb lopp'd off."

Sec. 230. Reprisal.—

"*Hot.* . . . I am on fire,
To hear his rich reprisal is so nigh."[1]

A reprisal is the forcible taking of property or other thing from one nation, by another, in satisfaction for an injury committed by the former on the latter.[2] The reprisal mentioned here is in the nature of a general reprisal, which is made by virtue of a commission delivered to officers or citizens of the aggrieved state or nation, directing them to take the person or property belonging to the offending state or nation, wherever it can be found.[3]

Sec. 231. Counterfeit.—

"*Fal.* . . . Counterfeit? I lie, I am no counterfeit: To die is to be a counterfeit; for he is but a counterfeit of a man, who has not the life of a man: but to counterfeit dying, when a man thereby liveth, is to be no counterfeit, but the true and perfect image of life indeed."[4]

In the criminal law, a counterfeit is something made false, in the semblance of that which is true.[5] To make

---

Cade thus refers to the kingdom, in 2' Henry VI: "*Cade.* . . thereby is England maimed, and fain to go with a staff," etc. (Act IV, Scene II.)

The earl of Surrey, tells Cardinal Wolsey, in King Henry VIII: "*Sur.* First, that, without the king's assent or knowledge, you wrought to be a legate; by which power, you maim'd the jurisdiction of all bishops." (Act III, Scene II.)

Upon being assaulted by Iago, in Othello, Roderigo cries: "I am maim'd forever:—Help, ho." (Act V, Scene I.)

[1] 1' Henry IV, Act IV, Scene I.
[2] 1 Bl. Comm. c. 7.
[3] Wheaton, Int. Law; 2 Vattel, Law Nations, sec. 342.
[4] 1' Henry IV, Act V, Scene IV.
[5] Viner, Abr. Counterfeit.

something counterfeit always implies a fraudulent intent, which of course is a necessary ingredient of every criminal act. The distinction noted by Falstaff is based upon the very essential definition of a criminal counterfeit, for a live man would not bear the same semblance as a dead man, as the essential of life would be present and only a dead man could be a true counterfeit of one without life, in the true sense of a legal counterfeit.

Prince John thus addressed the archbishop of York, in 2' Henry IV: "*P. John.* . . . You have taken up, under the counterfeited zeal of God, The subjects of his substitution, my father." (Act IV, Scene II.)

Gower said of Pistol, in Henry V: "Why, this is an arrant counterfeit rascal; I remember him now; a bawd, a cut-purse." (Act III, Scene VI.)

Gower said to Pistol, in Henry V: "*Gow.* Go, go—you are a counterfeit cowardly knave." (Act V, Scene I.)

Speaking of Margaret, Suffolk said, in 1' Henry VI: "*Suff.* As plays the sun, upon the glassy streams, Twinkling another counterfeited beam, So seems this gorgeous beauty to mine eyes." (Act V, Scene III.)

Richard says of Clifford, in 3' Henry VI: "*Rich.* . . O, would be did; and so, perhaps, he doth; 'Tis but his policy to counterfeit." (Act II, Scene VI.)

Buckingham tells Gloster, in King Richard III: "*Buck.* Tut, I can counterfeit the deep tragedian." (Act III, Scene V.)

Thersites says to Patroclus, in Troilus and Cressida: "*Ther.* If I could have remembered a gilt counterfeit, thou would'st not have slipped out of my contemplation." (Act II, Scene III.)

Timon of Athens tells the Poet and Painter: "*Tim.* Thou draw'st a counterfeit, best in all Athens; thou art, indeed, the best: thou counterfeit'st most lively." (Act V, Scene I.)

Coriolanus tells the citizens from whom he seeks support: "*Cor.* . . and since the wisdom of their choice is rather to have my hat than my heart, I will practice the insinuating nod, and be off to them most counterfeitly; that is sir, I will counterfeit the bewitchment of some popular man, and give it bountifully to the admirers." (Act II, Scene III.)

Romeo asks Benvolio and Mercutio: "Good-morrow to you both. What counterfeit did I give you?" (Act II, Scene IV.)

Sec. 232. Death by judicial sentence.—

"*King.* Bear Worcester to the death, and Vernon too;
Other offenders we will pause upon."[1]

The king's orders respecting the fate of the Earl of Worcester and Sir Richard Vernon, was equivalent to a direction to place them upon speedy trial for their treason and in a summary manner accomplish their death by judicial sentence.[2] The trials of such prisoners were hardly trials, even in names, because when the victorious army or the head of such an army desired to accomplish the death of any of the prisoners taken, at this period, it was undertaken and carried out, with but little delay.

---

[1] 1' Henry IV, Act V, Scene V.

[2] Rolfe's First Part of King Henry IV, p. 256, notes.

Cloten says to Guiderius, in Cymbeline:

"Die the death:
When I have slain thee with my proper hand,
I'll follow those that even now fled hence."

(Act IV, Scene II.)

CHAPTER XIX.

"SECOND PART OF KING HENRY THE FOURTH."

Sec. 233. Accomplices.
234. Assurance—Security.
235. Punishment by the stocks.
236. Infamy.
237. Laws of Land-service.
238. Action.
239. Eating flesh contrary to law.
240. "Faitors."
241. Inns of Court.
242. A "rotten case"—No Counsel in.
243. Riot.
244. "A friend i' the Court."
245. Commitment for Contempt of Court.
246. Law no respector of persons.
247. Falstaff's Commitment to prison.

Sec. 233. Accomplices.—

"*Mor.* The lives of all your loving complices
Lean on your health; the which, if you give o'er
To stormy passion, must perforce decay."[1]

An accomplice is one who is, in some way, concerned in the commission of a crime, but not as principal.[2] In its broader sense the term includes all persons concerned in the commission of the crime, either as principals or accessories,[3] before or after the fact and this is the sense in which it is used here, the word "complices," being a mere contraction of the word accomplices.

---

[1] 2' Henry IV, Act I, Scene I.

[2] 1 Russell, Crimes, 21.

[3] 4 Bl. Comm. 331.

A Messenger, thus greets the French Dauphin and soldiers, in 1' Henry VI: "*Mess.* Success unto our valiant general, and happiness to his accomplices." (Act V, Scene II.)

Sec. 234. Assurance—Security.—

"*Page.* He said, sir, you should procure him better assurance than Bardolph: he would not take his bond and yours; he liked not the security.

Fal. . . . To bear a gentleman in hand and then stand upon security: the whoreson smooth-pates do now wear nothing but high shoes and a bunch of keys at their girdles; and if a man is thorough with them, in honest taking up, then they must stand upon—security. I had as lief they put rats-bone in my mouth, as offer to stop it with security. I looked he should have sent me two and twenty yards of satin, as I am a true knight, and he sends me security. Well, he may sleep in security."[1]

Assurance is here used in the sense of indemnity or insurance and not as an instrument of conveyance or warranty of property conveyed, as it is more properly used, in a strictly legal meaning.[2] A security is that which renders a matter sure or certain as an instrument which guarantees the performance of a certain contract.[3] It is used, also, to apply to a person who engages to see to the performance of another's agreement[4] and this is the sense in which Falstaff uses it in the above lines.

Young Clifford, thus urges his father, in 2' Henry VI: "*Y. Cliff.* And so, to arms, victorious father,
To quell the rebels and their 'complices." (Act V, Scene I.)

Edward thus replies to Warwick, in 3' Henry VI: "*K. Edw.* Yet, Warwick, in despite of all mischance, Of thee thyself, and all thy 'complices, Edward will always bear himself as king." (Act IV, Scene III.)

[1] 2' Henry IV, Act I, Scene II.
[2] 2 Bl. Comm. 294.
[3] Bouvier's Law Dictionary.
[4] 3 Blackf. (Ind.) 431.

Lord Scroop remonstrated against the liberation of a prisoner, King Henry V, asked to be liberated, as follows: "*Scroop.* That's mercy, but too much security: Let him be punished, Sovereign, lest example, breed, by his sufferance, more of such a kind." (Act II, Scene II.)

Sec. 235. Punishment by the stocks.—

"*Ch. Jus.* To punish you by the heels, would amend the attention of your ears; and I care not, if I become your physician.

Fal. I am as poor as Job, my lord; but not so patient; your lordship may minister the potion of imprisonment to me, in respect of poverty; but how I should be your patient to follow your prescriptions, the wise may make some dram of a scruple, or, indeed, a scruple itself."[1]

The Chief Justice here clearly threatens Falstaff with the punishment by use of the stocks for his running away, after the warrant for his arrest for the Gads-hill robbery and Falstaff, by a covert threat, indicates to the Chief Justice that if he is so punished, the Prince of Wales would no doubt interfere to effectuate his escape.

"Stocks" was an apparatus of wood, much used, in former times, for the punishment of offenders against the English laws. The culprit was placed on a bench with his feet fastened in holes, under a movable board and he was allowed to remain there according to the severity of the punishment desired to be inflicted. In 1350, (25 Edw. III) provision was made for application of the stocks to unruly artificers and in 1376 the Commons prayed the King to establish stocks in every village in the kingdom. It became a common method of punishment about the time of the Poet and was used in conjunction with the whipping post, frequently, about that period, for the punishment of such trifling offenders as Falstaff and his companions.[2]

In excusing his refusal of a loan to Timon of Athens, Lucullus said to Flaminius: "*Lucul.* . . . thou knowest well enough, although thou comest to me, that this is no time to lend money; especially upon bare friendship, without security." (Act III, Scene I.)

[1] 2' Henry IV, Act I, Scene II.

[2] III Reeve's History Eng. Law, 345.

Volumnia tells Coriolanus, in her appeal for Rome, before his tent: "*Vol.* There is no man in the world more bound to his mother; yet here he lets me prate, like one i'the stocks." (Act V, Scene III.)

The process whereby the duke of Cornwall and his wife Regan, placed the Earl of Kent in the stocks, in King Lear, is described as follows:

"*Corn.* Fetch forth the stocks, ho:
You stubborn ancient knave, you reverend braggart,
We'll teach you—
Kent. Sir, I am too old to learn;
Call not your stocks for me; I serve the king,
On whose employment I was sent to you:
You shall do small respect, show too bold malice
Against the grace and person of my master,
Stocking his messenger.
Corn. Fetch forth the stocks:
As I've life and honour, there shall he sit till noon.
. . . . . (Stocks brought out.)
Corn. This is a fellow of the self-same colour
Our sister speaks of:—Come, bring away the stocks.
Glo. Let me beseech your grace not to do so:
. . . . your purpos'd low correction
Is such, as basest and contemned'st wretches,
For pilferings, and most common trespasses,
Are punish'd with: the king must take it ill,
That he's so slightly valued in his messenger,
Should have him thus restrain'd.
Corn. I'll answer that.
Reg. My sister may receive it much more worse,
To have her gentleman abus'd, assaulted,
For following her affairs.—Put in his legs.—
(Kent is put in the stocks.)"
(Act II, Scene II.)

The Fool tells Kent: "An thou had'st been set i'the stocks for that question, thou had'st well deserved it."

Kent asks the Fool: "Where learned you this, fool?" And he replies:

"*Fool.* Not i'the stocks, fool." And when Lear appears, he asks: "*Lear.* Who put my man i'the stocks?" (Act II, Scene IV.)

Sec. 236. Infamy.—

"*Ch. Jus.* Well, the truth is, Sir John, you live in great infamy.

Fal. He that buckles him in my belt cannot live in less."[1]

Infamy, at common law, was the condition produced by the conviction of crime and the loss of honor, which was held to render the infamous person incompetent as a witness.[2] A man, for instance, who was guilty of an offense inconsistent with the fundamental principles of honesty and humanity, was called an infamous person, and the law considered his oath of no weight, in a court of justice, because he was unworthy of belief.[3] The Chief Justice here accused Falstaff of leading an idle, trifling, swindling, fraudulent existence, which made him an infamous person,[4] or one unworthy of respect.

Sec. 237. Laws of land-service.—

"*Ch. Jus.* I sent for you, when there were matters against you for your life, to come speak with me.

Fal. As I was then advised by my learned counsel in the laws of this land service, I did not come."[5]

Falstaff here refers to his knight service, as a soldier, under the king and the advice given him as to his exemption from answering to the civil authorities, while engaged in such service. Military service, under the feudal system, was evidently "this land service" referred to, for

[1] 2' Henry IV, Act I, Scene II.

[2] Gilbert Evidence, 256.

[3] Coke, Litt. 6; 2 Rolle, Abr. 886.

[4] Coke, Litt. 6.

Queen Margaret is made to say, of Gloster's death, in 2' Henry VI:

"*Q. Mar.* . . This get I by his death: Ah, me, unhappy;
To be a queen and crown'd with infamy." (Act III, Scene II.)

[5] 2' Henry IV, Act I, Scene II.

under the feudal tenure, when the lord called upon the knights to render such service, in support of the king, they were compelled to do so and certain exemptions applied to them when so engaged. The sovereign, in England had authority, in time of war, by articles of war, to dispose of all crimes not specified by military law, and to assess all punishments not reaching to death or mutilation[1] and Falstaff here attempts to hide behind this authority as a cloak to protect him from his failure to answer to the civil authority.

Sec. 238. Action.—

"*Host.* Master Fang, have you entered the action?
Fang. It is entered."[2]

In practice, an "action" is the formal demand of one's rights, from another person, made and insisted upon, in a formal manner, in a court of justice.[3] This is the kind of an action, these lines refer to, for Hostess Quickley had sued Falstaff and wanted the officer to arrest him, at a time when the attachment of the person was a proper proceeding upon such causes of action for debt and to redress the wrongs of which she had made complaint.[4]

Sec. 239. Eating flesh contrary to law.—

"*Fal.* . . . Marry, there is another indictment upon thee, for suffering flesh to be eaten in thy house, contrary to the law; for the which, I think, thou wilt howl."[5]

---

[1] Benet, Military Law; Tyler, Military Law.
[2] 2' Henry IV, Act II, Scene I.
[3] Bracton, 98b; Coke, 2' Inst. 40; Coke, Litt. 289.
[4] 3 Bl. Comm. 280; 4 Bl. Comm. 283.

Falstaff persuades the Hostess to withdraw her action against him, in this same play, as follows: "*Fal.* . . . Come, an it were not for thy humors, there is not a better wench in England. Go, wash thy face and draw thy action." (Act II, Scene II.)

[5] 2' Henry IV, Act II, Scene IV.

There were various statutes enacted during the reign of Elizabeth, as well as during the reign of James I forbidding boarding house keepers and victualers from furnishing flesh to be eaten in their houses, during the Lenten season[1] and this reference is, no doubt, to one of these statutes, which, in the United States, would be held to be an unconstitutional enactment, because a sumptuary law.

Sec. 240. "Faitors."—

"*Pistol.* I'll see her damned first; to Pluto's damned lake, by this hand, to the infernal deep, with Erebus and tortures vile also. Hold hook and line, say I. Down, down, dogs: down, faitors: Have we not Hiren here?"[2]

The word "faitors," as used in an old statute of the reign of Richard II, is synonymous with *evil-doers.*[3] Standing alone, it would seem to be a contraction of the Latin word *factors,* meaning doers; but by the use of the term in this statute, it is probable that Shakespeare used it as a term of reproach, from the preceding word used, in this same connection, so he must have been familiar with this statute.

Sec. 241. Inns of court.—

"*Shal.* He must then to the inns of court shortly: I was once of Clement's-Inn; where, I think, they will talk of mad Shallow yet."[4]

"Inns of Court" is the English name for those voluntary associations or societies, which have the exclusive right of calling persons to the English Bar. There are four such societies in London, *i. e.*, the inner temple, the middle temple, Lincoln's inn and Gray's inn, and each of these inns possesses several smaller inns,—no doubt like

---

[1] Rolfe's Second part of King Henry IV, p. 208, notes; V Reeve's History Eng. Law.

[2] 2' Henry IV, Act II, Scene IV.

[3] III Reeve's History Eng. Law; Rolfe's Second part of King Henry IV, p. 201, notes.

[4] 2' Henry IV, Act III, Scene II.

that mentioned in the above verse—which are mere collections of houses or chambers, as Clifford's inn, New inn, Furnival's inn, etc. The four inns are governed by a board, called the "benchers," who are generally learned lawyers, and local habitations are occupied exclusively by barristers and are a source of great wealth.

Each inn is self-governing and independent of the others, but an educational qualification is imposed on the students and other rules adopted for the admission into the various inns.

The existence of these inns dates to an early day in English history. It is beyond dispute that the Temple was inhabited by a law society in the reign of Edward III, for on acquisition of the property in 1324, the same was leased to divers professors of law, at a rental of 10 lb. per annum and these professors came from Thavies Inn, in Holborn.[1] When the inheritance of this house again fell to the crown in the reign of Henry VIII, it was again leased to the lawyers by this monarch and they continued tenants of the crown until the sixth year of James I, when a new lease was made for the benefit of the students and professors of the law.[2]

---

[1] Dugd. Or. Jur. 145.

[2] III Reeve's Hist. Eng. Law, pp. 346, 347.

Professors of law resided in Gray's inn, during the reign of Edw. III, under a lease from Lord Grey, of Wilton, and Henry VIII granted a fee-farm lease of the house to them, for 6 lbs. 13 s. 4d. per annum. And in 18' Edw. III, Lady Clifford granted a demise of Clifford's inn, near Fleet street, to the law societies. III. Reeve's Hist. Eng. Law, p. 347.

Falstaff, referring to his association with Justice Shallow, at the inns of court, said: "*Fal.* I do remember him at Clement's Inn, like a man made after supper of a cheese-paring, when he was naked he was, for all the world, like a forked radish." (2' Henry IV, Act III, Scene II.)

Referring further along, to his experience at the inns of court, Shallow, is made to say: "*Shal.* . . . you had not four such swing-bucklers in all the inns of court again: and I may say to

Sec. 242. A rotten case.—No Counsel in.—

"*Mow.* Well, by my will, we shall admit no parley.
West. That argues but the shame of your offense: a rotten case abides no handling."[1]

This reply to Mowbray, by Westmoreland evidently refers to the fact that, at common law, unless one had a meritorious case, no counsel would be assigned and no defense considered, in the formal way of a trial.

The common law denied the privilege of counsel on trials of felony or treason, while in the lesser offenses, counsel was awarded.[2] In the trial of the Duke of Norfolk, in the reign of Elizabeth, for treason, he made a touching appeal to the Court, for counsel, but it was in vain, as his case was deemed "a rotten case."[3]

Jeffreys said to Sidney, in reply to a demand for counsel: "If you assign us any particular point of law, if the court think it such a point as may be worth debating, you shall have counsel."[4] And on the trial of Cornwallis, Lord Nottingham said, with reference to counsel: "No other good reason can be given why the law refuses to allow the prisoner at the bar counsel, in matters of fact, where life is concerned, excepting this, that the evidence by which he is condemned ought to be so very evident and

---

you we knew where the bona-robas were; and had the best of them all at commandment." (2' Henry IV, Act III, Scene II.)

Cade gives orders to his followers: "*Cade.* So, sirs:—Now go some and pull down the Savoy; others to the inns of court; down with them all." (2' Henry VI, Act IV, Scene VII.)

[1] 2' Henry IV, Act IV, Scene I.

[2] 1 Chitty, Cr. Law, 409; 2 Hawk, c. 39.

[3] 1 How. St. Tr. 965. After narrating the treatment he had received, Norfolk said: "With reverence and humble submission, I am led to think I may have counsel. And this I show, that you may think I move not this suit without any ground. I am hardly handled; I have had short warning and no books." 1 How. St. Tr. 965.

[4] 9 How. St. Tr. 834.

so plain, that all the counsel in the world should not be able to answer it."[1]

So, here, in denying any parley, as construed by Westmoreland, the case was so clear as to "abide no handling."

Sec. 243. Riot.—

"*K. Hen.* . . When that my care could not withhold
thy riots,
What wilt thou do, when riot is thy care?"[2]

A riot, at common law, was a tumultuous disturbance of the peace by three or more persons, assembling together with a mutual intent to assist each other against all who should oppose them, in the execution of some private enterprise, and the execution or accomplishment of such enterprise, in such a violent and turbulent manner, as to cause terror or disturbance to the people of a neighborhood, regardless of whether the act accomplished was lawful or unlawful.[3]

The King here, of course, refers to such unlawful enterprises as that at Gads-hill and other such escapades, accomplished by the Prince, Falstaff, Poins, Bardolph and their companions, and the meaning is plainly to be derived from the language used, that if, when he was so careful to dissuade him from such conduct, without success, what would result, when he had only his own inclinations to follow without hindrance, with a keen desire to accomplish such unlawful enterprises.

---

[1] 7 How. St. Tr. 149.

[2] 2' Henry IV, Act IV, Scene IV.

[3] Coke, 3 Inst., 176; 4 Bl. Comm. 146.

The subject of riots occasioned a statute during the reign of Henry IV (13 Henry IV, c. 7) and whether to suppress the tumults caused by the wayward Prince and his followers, or for other purposes, during this reign it was enacted that the summary method theretofore in force for the suppression of rioters, be even more enhanced, by giving to any two or more justices of the peace, of any county, with the sheriff or under sheriff,

Sec. 244. A friend in the court.—

"*Shal.* Yes, Davy. I will use him well; a friend i' the court is better than a penny in purse."[1]

This is a lawyer-like suggestion that a cause is better safeguarded when the incumbent of the judgment seat is a friend of the party whose rights are to be decided.[2] Of course lawyers, generally, recognize that this kind of influence has very little to do with the decision of lawsuits, for according to correct standards, such things enter but little into the consideration of causes to be decided in courts of justice, but at the same time, as the incumbents of the judgment seat are but men, with human weaknesses and emotions, the fact that a friend is on the bench is not to be disparaged, in the selection of a forum for the consideration of the rights of a litigant. Shallow here intimates that it is far better than money to have "a friend i' the court," and the Poet is right in putting such a speech in the mouth of one called Shallow.

---

authority to arrest and take down the evidence against them and by this record such offenders were to stand convicted, the same as a presentment by twelve men. And this statute was also enlarged, during the reign of Henry V, by giving the chancellor authority to appoint a commission to enquire into any failure on the part of the justices or sheriffs to discharge their duty, under the statute of 13' Hen. IV, c. 7. III Reeve's History Eng. Law, pp. 432, 455.

Speaking of the former life of Henry V, the Archbishop of Canterbury, in Henry V, (Act I, Scene I) is made to say: "*Cant.* . . his addiction was to courses vain; his companies unletter'd, rude and shallow; His hours fill'd up with riots, banquets, sports; and never noted in him any study, any retirement, any sequestration from open haunts and popularity."

[1] 2' Henry IV, Act V, Scene I.

[2] It is probable, as suggested by Doctor Rolfe, that this expression is taken from the old *Romaunt of the Rose*, wherein it is said:

"For frende in courte air better is
Than penny is in purse, certis."

(Rolfe's 2' Henry IV, p. 242, notes.)

Sec. 245. Commitment for contempt of court.—

"*Ch. Jus.* I then did use the person of your father;
The image of his power lay then in me:
And, in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king, whom I presented,
And struck me in my very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you."[1]

To "commit" a person, is to send him to prison by virtue of a lawful warrant or order.[2] The Chief Justice of England, as here explained, in the enforcement of the law, did his duty, in the name of and as the representative of the King, for the protection of his own and the rights of the kingdom's subjects. In this sense, an infraction of the laws of England was regarded as an infraction of the personal rights of the King, and when the majesty and authority of the law was attacked, by any one, as here described, it would be the duty of the person occupying the judgment seat, to commit the person, as for a contempt of court, as these lines show was done in this instance.[3]

---

[1] 2' Henry IV, Act V, Scene II.

[2] 1 Chitty, Cr. Law, 110.

[3] Bacon, Abr., *Courts;* Rolle, Abr., 219; 8 Coke, 38b; 1 Kent's Comm. 236.

Under the Plantagenets and Tudors, a Chief Justice of England could be removed, like any other officer of the Crown, (Verplanck) and hence the King's magnanimous act in retaining Gascoigne, is the more noteworthy. (Rolfe's 2' Henry IV, pp. 245, 247, notes.)

Of the assault here referred to, upon Chief Justice Gascoigne—by the Prince—Reeves said: "The youthful sallies of this prince have furnished juridical history, with an anecdote that shows him to have once been a contemner both of justice and those who administered it." But of this language, concerning Henry V, Mr. Finlason observes: "This is hardly just to the character

Sec. 246. Law no respecter of persons.—

"*King.* Happy am I, that have a man so bold,
That dares do justice on my proper son:
And not less happy having such a son,
That would deliver up his greatness so,
Into the hands of justice."[1]

These lines have reference to the impartial enforcement of the laws without respect to persons, although the person against whom the law is enforced shall be the son of a king. This quotation of the words of the King's father, shows that the King himself, realized the necessity of a strict and impartial enforcement of the laws for the protection of his own rights.

Justice, being in itself, confined to things simply good or evil, in its enforcement each man must take such proportion as he ought to take, regardless of the person upon whom the law operates, for in no other way can distributive justice operate, in the distribution of rewards or punishments according to the merits of each person, without inequality or partiality.[2]

---

of this king, for, according to the version of the story commonly given in history, the offence, that of striking a judge, was committed by the *prince*, and nobly attoned for by the *king*, seeing that on his accession he received with marked respect the judge—Chief Justice Gascoigne—whom he is said to have struck." (III Reeve's History, Eng. Law, p. 458.) And this is as the Poet presents it.

King Henry V directs the duke of Exeter: "*K. Hen.* . . Uncle of Exeter, enlarge the man committed yesterday, that rail'd against our person." (Act II, Scene II.)

Gloster was committed, in 2' Henry VI, as follows: "*Suff.* . . . I do arrest you, in his highness name; and here commit you to my lord cardinal to keep, until your further time of trial." (Act III, Scene II.)

Gardiner tells Cranmer, in King Henry VIII, in the Council Chamber: "*Gar.* . . 'Tis his highness pleasure, And our consent, for better trial of you, From hence, you be committed to the Tower." (Act V, Scene II.)

[1] 2' Henry IV, Act V, Scene II.

[2] 2 Coke, 2' Inst., 56; Touillier, Droit, Civ. Fr. tit. prel. n. 5.

Sec. 247. Falstaff's commitment to prison.—

"*Ch. Jus.* Go carry Sir John Falstaff to the Fleet.
Take all his company along with him."[1]

This is the Chief Justice's sentence against the "Fat Knight," that he be taken and incarcerated in the Fleet street prison, which takes its name from the river Fleet, that flows by it, and upon which a gate of the prison opened.[2] The Fleet Prison was first used by those who were condemned by the Star Chamber, but it was used before its destruction, as a prison for all kinds of offenders.[3]

---

[1] 2' Henry IV, Act V, Scene V.
[2] Rolfe's 2' Henry IV, pp. 254, 255,
[3] *Ante idem.*

CHAPTER XX.

"KING HENRY THE FIFTH."

Sec. 248. Seditious and insurrectionary bills.
249. Bills against Ecclesiastics.
250. Henry the Fifth's favor toward Ecclesiastics.
251. Salic Law and Henry the Fifth's Claim to France.
252. *Lex terra salica* explained.
253. Ancestor.
254. Impounding strays.
255. Departments of Government working harmoniously.
256. Adultery.
257. Capital crimes.
258. Motive for crime.
259. Money paid in earnest.
260. Divesting property rights.
261. Respondeat superior not applicable to King and subject.
262. Bearing testimony.
263. Martial Law.

Sec. 248. Seditious and insurrectionary bills.—

"*Cant.* My lord, I'll tell you,—that self bill is urg'd,
Which, in the eleventh year o' the last king's reign,
Was like, and had indeed against us passed,
But that the scrambling and unquiet time
Did push it out of further question."[1]

This has reference to the attempt, on the part of those called heretics or Lollards, to stir up an insurrection against the established church, by laws forbidding the holding of lands and property by the church. Certain sectaries, during the reign of Henry IV, held language of the most extreme character and "described an established church as unlawful and told the people not to pay their tithes."[2] The lords and commons presented a petition to the king, stating that the secretaries excited the

[1] Henry V, Act I, Scene I.

[2] III Reeve's History Eng. Law, p. 426.

people to take away the possessions of the church, of which the clergy were as assuredly endowed, as the temporal lords were of their inheritances and that if these evil purposes were not resisted, they would move the people to take away the property of the latter and have all things in common, to the open commotion of the people and the subversion of the realm.[1]

Sec. 249. Bills against ecclesiastics.—

"*Cant.* . . . If it pass against us,
We lose the better half of our possession;
For all the temporal lands, which men devout
By testament have given to the church,
Would they strip from us; being valued thus,—
As much as would maintain, to the king's honour,
Full fifteen earls, and fifteen hundred knights;
Six thousand and two hundred good esquires;
And, to relief of lazars, and weak age,
Of indigent faint souls, past corporal toil,
A hundred alms houses, right well supplied;
And to the coffers of the king beside,
A thousand pound by the year; thus runs the bill."[2]

The growing devices practiced by ecclesiastics for the enlargement of the domains of the church, which originally led to the enactment of the statute of mortmain and the later statute (15 Richard II, c. V)[3] preventing the purchase of lands, for the use of the church, by lay cor-

---

[1] III Rot. Parl. fol. 583; III Reeve's History Eng. Law, p. 427.

The bill referred to, led to the passage of an act, of which Mr. Reeves said: "The meeting of heretics in their conventicles and schools are stigmatized in this act with the name of confederacies to stir up sedition and insurrection; the very pretence that had been made use of by the Romans against the primitive Christians, and which had been adopted by the Romish church ever since, to suppress all opposition to inquiry into its errors." III Reeve's History English Law, p. 426.

[2] Henry V, Act I, Scene I.

[3] III Reeve's History Eng. Law, 365.

porations, or others, for its benefit, led to the agitation and attempt to enact into statutory law, other edicts to limit the growing covetousness of the church, during the reign of Henry V. During this period parliament was apprehensive not only of heresy, but of communism, revolution and spoilation.

An open revolt was threatened, about the time to which the Archbishop addresses himself, and the commons, in their address to the king, stated that "the insurgents attempted to destroy the faith, the king, the temporal and spiritual power and all manner of policy and law;" to which the king replied, that "they meant to destroy him, and the lords, to confiscate the possessions of the church, to secularize the religious orders, to divide the realm into confederate districts and to appoint a president of the commonwealth."[1]

Sec. 250. Henry V's favor toward ecclesiastics.—

"*Ely.* But what prevention?
Cant. The king is full of grace and fair regard.
Ely. And a true lover of the holy church."[2]

These lines indicate an accurate knowledge, by the Poet, of the history of the legislation favorable to the ecclesiastics, during the early period of the reign of Henry V, as detailed by the histories of the statutes of this reign. Speaking of these acts, Reeves said: "The whole secular power seems, at the beginning of this reign, to have been made subservient to the ends of the prelates in suppressing

[1] Wols, 385; Rot. Parl. iv, 24; Rym, ix, 89, 193; III Reeve's History Eng. Law, p. 427.

It was the belief of this age that revolution was threatened and the statutes passed at this period, against the Lollards and heretics, were not the result of the agitation of the clergy alone, but also of the nobility and commonalty of the realm. (See, 2 Henry V, st. 1, c. vii.)

[2] Henry V, Act I, Scene I.

the Lollards."[1] In the preamble of the statute against the Lollards, they were treated as state criminals and people confederated to destroy the king; the justices and other peace officers, on taking their offices, were required to take an oath to use the power of their various offices to destroy such heresies; they were made to suffer forfeiture of their goods, as in the case of felons, and heresy being a spiritual offense, within ten days after their arrest they were delivered to the holy church to be tried in accordance with its rules, and thus the intolerance and persecution of the church was given full sway.[2]

Sec. 251. Salic law and Henry V's claim to France.—

"*K. Hen.* . . . My learned lord, we pray you to proceed,
And justly and religiously unfold,
Why the law Salique, that they have in France,
Or should, or should not, bar us in our claim."[3]

The code of laws known as the *salic law* is a collection of the popular laws of the Salic or Salian Franks, committed to writing in barbarous Latin, in the 5' century. Several texts of this code are in existence, but because of the dark ages in which it had its origin, more or less mystery surrounds it. The code relates principally to the definition and punishment of crimes, but there is a chapter or portion of the code relating to the succession of salic lands, which was probably inserted in the law, at a later date. *Salic lands,* or *terra salica,* came to mean inherited land as distinguished from property otherwise acquired, but even in the 15' century, as the verse quoted indicates, there was but little known as to the origin or exact meaning of this law. It was by a very doubtful construction that the salic law in the 14' century was held to exclude the suc-

[1] III Reeve's History Eng. Law, p. 452.
[2] III Reeve's History Eng. Law, p. 453.
[3] Henry V, Act I, Scene II.

cession of females to the throne of France, but on the accession of Phillip the Long, it was given this interpretation, and the fact that Edward III rested his claim to the throne on female succession no doubt led the French to place this meaning on the law and to adhere to it for all future time.[1]

Sec. 252. Lex terra salica explained.—

"*Cant.* . . . There is no bar,
To make against your highness' claim to France,
But this, which they produce from Pharamond,—
In terram Salicam mulieres ne'succedant,
No woman shall succeed in Salique land:
Which Salique land, the French unjustly gloze,
To be the realm of France, and Pharamond
The founder of this law and female bar.
Yet their own authors faithfully affirm,
That the land Salique lies in Germany,
Between the floods of Sala and of Elbe:
Where Charles the Great, having subdued the Saxons,
There left behind and settled certain French;
Who, holding in disdain the German women,
For some dishonest manners of their life,
Establish'd there this law, *to-wit, no female*
Should be inheritrix in Salique land;
Which Salique, as I said, 'twixt Elbe and Sala,
Is at this day in Germany call'd Meisen.
Thus doth it well appear, the Salique law
Was not devised for the realm of France:
Nor did the French possess the Salique land
Until four hundred one and twenty years
After defunction of King Pharamond,
Idly suppos'd the founder of this law.

. . . . . .

King Pepin's title, and Hugh Capet's claim,
King Lewis his satisfaction, all appear
To hold in right and title of the female:
So do the kings of France unto this day;

---

[1] Hessel's *Lex Salica;* Hallam's *Europe in the Middle Ages.*

For Holinshed's exposition of this law, which is taken by the Poet, in the following verse, see Rolfe's King Henry the Fifth, p. 188, notes.

Howbeit they would hold up this Salique law
To bar your highness claiming from the female;
And rather choose to hide them in a net,
Then amply to imbare their crooked titles
Usurp'd from you and your progenitors." [1]

As stated here, the Frankish law did not in general exclude females but the succession to these Salique lands was confined to males, probably from the importance of procuring the military service, which the females could not render, and this law, while not in general in vogue in France, was invoked to bar the claim of the successors of Edward III to the French crown. The English have always been inclined to ridicule the rule excluding females from inheriting the throne of France, and Lord Bacon gives a purported colloquy between an Englishman and a Frenchman, wherein the Englishman construed the law to mean that succession was barred as to "the women themselves, not of such males as claimed by women." And on being asked where this gloss was found, he replied: "I'll tell you, sir; look on the backside of the record of the law Salique, and there you shall find it endorsed," implying, as Bacon concludes,[2] that there was no such thing as the law Salique, but this land construction was a fiction.

Sec. 253. Ancestor.—

"*Cant.* . . . we, of the spirituality,
Will raise your highness such a mighty sum,
As never did the clergy at one time,
Bring in to any of your ancestors."[3]

---

[1] Henry V, Act I, Scene II.

[2] Apophthegms, No. 184.

Mr. Davis, in his Law in Shakespeare, observes, in regard to the law Salique: "It was decreed by Pharamond and was part of the code of the law of the Salians, a people of Germany," (Page 184) but history rather leads to the conclusion the Poet makes the Archbishop reach, that "Pharamond" was "idly suppos'd the founder of this law."

[3] Henry V, Act I, Scene II.

An ancestor is one who has preceded another in a direct line of descent. In real property law, the word is used to indicate the person last seized of the estate, or a former possessor.[1]

At the common law the word is understood to apply as well to the immediate parents of the person in being, as to those that are higher up, in the line of descent,[2] and this is the meaning to be given to the term as used here.

Sec. 254. Impounding strays.—

"*Cant.* She hath herself not only well defended,
But taken and impounded as a stray,
The King of Scots."[3]

Any domestic animal, which has left its inclosure or place of keeping is held to be a "stray," and at common law, a stray animal was apt to be impounded or taken up and placed in an inclosure called a *pound*, for safe keeping, until the damages and costs were paid.[4]

Distress, at common law, was a remedy for the damages done by stray cattle feeding on land of the owner, and trodding down the grass, and the law authorizing the municipality to impound stray cattle is the outgrowth of this common law rule of property.[5]

The King of the Scots here, by the Archbishop, is likened to a "stray," who had been caught, *damage feasant,* and impounded for safe keeping.

---

[1] 2 Bl. Com. 201.

[2] Bacon, *Abr.;* 2 Bl. Com. 209; Cary, Litt., 45.

The Duke of Exeter tells the French King, in Henry V: "*Exe.* And, when you find him evenly deriv'd from his most fam'd of famous ancestors, Edward the Third, he bids you then resign your crown and kingdom indirectly held from him, the native and true challenger." (Act II, Scene IV.)

[3] Henry V, Act I, Scene II.

[4] Webster's Dictionary, where these lines by the Poet are used to illustrate a "stray" and the word "impound."

[5] 3 Bl. Comm. 6; Coke, Litt. 142, 161.

Sec. 255. Departments of government working harmoniously.—

"*Exe.* . . . government, though high and low, and lower,
Put into parts, doth keep in one concent,
Congruing in a full and natural close,
Like music." [1]

The institution or institutions, by which a state or nation makes and carries out those rules of action necessary to enable men to live in a social state, are generally called the government of that state or nation.[2] According to the seat of the supreme power of the state or nation, the classification of the government necessarily differs, and Aristotle's classification of governments, in this way has been generally followed down to modern times.[3]

The different branches of government and the different departments of the several branches, such as the legislative, executive and judicial, all having the same common object and end,—the proper enjoyment and regulation of the rights of the individual members of the social body,—the operation of the several departments ought to be harmonious so that they will "keep in one concent, congruing in a full and natural close, like music," for there is no better way of wording the harmonious whole that should obtain in the due enforcement of the powers of government, than this.

Sec. 256. Adultery.—

"*Quick.* . . . O Lord: here's corporal Nym's—now we shall have wilful adultery and murder committed. Good lieutenant Bardolph,—good corporal, offer nothing here."[4]

Adultery is the voluntary sexual intercourse of a married person with another, other than the offender's hus-

[1] Henry V, Act I, Scene II.
[2] 1 Bl. Comm. 389, 391; Vattel's Law of Nations.
[3] Aristotle, Politics, v. ch. 9.
[4] Henry V, Act II, Scene I.

band or wife.[1] If one of the parties is married and the other not, the crime of the former is adultery and that of the other is fornication.[2] The crime was not an indictable offense, at common law, but is made so by statute.[3]

Of course, Hostess Quick does not properly use the term, as the offense could not be committed between two males, but she probably intended to say that there would be an assault and murder committed, unless someone interfered to separate Corporal Nym and Pistol, neither of whom, it seems was hard to hold, after active hostilities actually appeared to be threatened as a result of the "battle of tongues."

Sec. 257. Capital crimes.—

"*K. Hen.* . . . If little faults, proceeding on distemper,
Shall not be wink'd at, how shall we stretch our eye,
When capital crimes, chew'd, swallow'd, and digested,
Appear before us?"[4]

A "capital crime" at common law, was one for which the punishment of death was inflicted.[5] Treason was such a crime, and this reference, by the king, to the crimes that his advisers had been guilty of, was for the purpose of having them commit themselves, as to the punishment to be assessed for the petty offense then in question, which, by the king's analogous reasoning, would apply, *a fortiori*, to the "capital crime" they were jointly guilty of, which

[1] Bishop, Marriage and Div., sec. 415.

[2] Bouvier's Law Dictionary.

[3] 4 Bl. Comm. 65.

Maecenas tells Octavia, in Antony and Cleopatra: "*Maec.* Each heart in Rome doth love and pity you: Only the adulterous Antony, most large in his abominations, turns you off." (Act III, Scene VI.)

[4] Henry V, Act II, Scene II.

[5] Sherwood's Cr. Law, Ch. 1; 2 Bl. Comm. 42; 1 Bishop, Cr. Law, 43.

had been "chew'd, swallowed and digested," or otherwise committed after full reflection and premeditation, which only added to the degree of the guilt.

Sec. 258. Motive for crime.—

"*Cam.* For me,—the gold of France did not seduce,
Although I did admit it as a motive,
The sooner to effect what I intended."[1]

"Motive" is the inducement, cause or reason why a given act is done.[2] In the criminal law, motive is always an essential element of the crime and the motive is always

---

In Coriolanus, Sicinius refers to capital crimes, as follows: "*Sic.* Peace. We need not put new matter to his charge:
What you have seen him do and heard him speak,
Beating your officers, cursing yourselves,
Opposing laws with strokes, and here defying
Those whose great power must try him; even this,
So criminal, and in such capital kind,
Deserves the extremest death." (Act III, Scene III.)

Capital punishment, by all governments, both ancient and modern, has been deemed to be within the legitimate power of government, but it is doubted, by theoretical writers, if such punishment is consistent with natural or Divine Law. As laws are enacted to protect society, it may be doubted if death should be inflicted except in cases where it is absolutely essential and when the law can be maintained in no other way.. This is the meaning given the offense as viewed by the speaker in the above verse, for he urges that the crime is "in such capital kind," that it "deserves the extremest death." (Boccacia, chap. 28.)

In King Lear, Albany arrests Edmund as follows: "Stay yet; hear reason.—Edmund, I arrest thee on capital treason." (Act V, Scene III.)

Speaking of his father's death, in Hamlet, Laertes asks the King: "But tell me, Why you proceeded not against those feats, So crimful and so capital in nature," etc. (Act IV, Scene VII.)

[1] Henry V, Act II, Scene II.

[2] Bouvier's Law Dictionary; 1 Bishop's Cr. Law, sec. 221, *et sub.*

proper to be explained or looked into, in order to show the criminal intent with which the crime was committed.[1]

The earl of Cambridge here, denies that the gold received from France furnished the motive for the crime of treason, he had confessed himself guilty of, although he had admitted this was the motive for his entering into the conspiracy to kill the king, but as he does not show an absence of criminal intent and freedom from wrongdoing, he consequently makes no legal excuse for his connection with the treasonable design.

Sec. 259. Money paid in earnest.—

"*K. Hen.* . . . You have conspir'd against our royal person,
Join'd with an enemy proclaim'd, and from his coffers,
Receiv'd the golden earnest of our death."[2]

Money paid in "earnest," is a partial payment for the purpose of binding the bargain.[3] Certain agreements for the sale of personal property are not legal unless something in "earnest" is given to bind the contract.[4] and a payment of "earnest" gives the buyer the right to demand a performance of the contract.[5]

The King here speaks of his own death as the consideration for which the payment was made and after the conspirators had "receiv'd the golden earnest" of his death, they could not back down from the performance of the contract and were legally bound to kill him, as they had agreed to do, for the money paid them.

---

[1] 1 Bishop's Cr. Law, sec. 221; 1 Chitty, Cr. Law, 233; 8 Coke, 146; 1 Greenleaf Evid. sec. 18; 9 Coke, 81a.

[2] Henry V, Act II, Scene II.

[3] 2 Kent's Comm. 389.

[4] Benjamin, on Sales, p. 161; Tiedeman, on Sales, sec. 71.

[5] *Ante idem:* 2 Bl. Comm. 447.

Timon of Athens, tells Phrymia and Timandra on their quest for gold from him: "*Tim.* More whore, more mischief first; I have given you earnest." (Act IV, Scene III.)

Sec. 260. Divesting property rights.—

"*Exe.* . . . He wills you, in the name of God Almighty,
That you divest yourself, and lay apart
The borrow'd glories, that, by gift of heaven,
By law of nature, and of nations, 'long
To him and to his heirs; namely, the crown."[1]

Divest, being practically the same word as to devest, used at common law, as the Poet explains it in this verse, is the dispossession of one's rights, property or privileges, before enjoyed.[2]

The realm of France is treated as belonging to King Henry and his representative demands the immediate surrender of the kingdom, in accordance with his rightful title, and this title is urged both according to the law of nations and that of nature, meaning his claim to the kingdom as the descendant of Edward III, who had established his right to the realm by force of arms, and lineal descent.

Sec. 261. Respondeat superior not applicable to King and subjects.—

"*K. Hen.* So, if a son, that is by his father sent about merchandise, do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father that sent him: or if a servant, under his master's command, transporting a sum of money, be assailed by robbers, and die in many unreconciled iniquities, you may call the business of the master the author of the servant's damnation:—But this is not so: the king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant; for they purpose not their death, when they purpose their services. Besides, there is no king, be his cause never so spotless, if it come to the arbitrement of swords, can try it out with all unspotted soldiers. Some, peradventure, have on them the guilt of pre-

[1] Henry V, Act II, Scene III.

[2] Bouvier's Law Dictionary.

> meditated and contrived murder; some, of beguiling virgins with the broken seals of perjury; some, making the wars their bulwark, that have before gor'd the gentle bosom of peace, with pillage and robbery. Now, if these men have defeated the law, and outrun native punishment, though they can outstrip men, they have no wings to fly from God: war is his beadle, war is his vengeance; so that here men are punished, for before-breach of the kings laws, is now the kings quarrel: where they fear'd the death, they have borne life away; and where they would be safe, they perish: Then if they die unprovided, no more is the king guilty of their damnation, than he was before guilty of those impieties, for which they are now visited. Every subject's duty is the king's; but every subject's soul is his own."[1]

The reasoning of the King here is in strict accordance with the relation of king and subject, as viewed at the common law and the rule of law, which made the principal liable for the acts of the agent, performed in pursuance of an express authority, or within the general scope of his powers, as agent,[2] was held not to apply to the relation of king and subject. Instead of the rule *respondeat superior*, (let the principal answer) when it came to king and subject the rule was rather *respondere non sovereign*, for the king was not under the authority of man, but of God and the law, or, as the maxim puts it, *"Rex non debet esse sub homine, sed Deo et lege."*[3]

The Poet makes the king give the underlying reason for the rule of law, which shaped itself into the maxim quoted, better, perhaps than half the lawyers of his period

[1] Henry V, Act IV, Scene I.

[2] Coke, 4' Inst. 114.

[3] Broom's Legal Maxims (3' London ed.) 46, 111; Bracton, 5.

But as the King reasons, penal responsibility, in the law, is always personal, and the obligation to respond or answer for an act never applies in the absence of a commission of the act, in person, or unless it was committed by someone standing in the place of the person sought to be held liable therefor.

could have done, and the reasoning to shift the responsibility for a war that he had brought on, from his own shoulders to the vengeance of the Divine Economy, is in keeping with the religious training which prompted the charge of an attribute even beneath that of the beasts of the field—for these even, cherish no such thing as vengeance—to the Almighty, in order, no doubt, to shift the blame from other shoulders, on which it ought to lie.

Sec. 262. Bearing testimony.—

"*Flu.* . . . I hope your majesty is pear me testimony, and witness, and avouchments, that this is the glove of Alencon, that your majesty is give me, in your conscience now."[1]

Bearing testimony is to make a statement, as a witness, under oath or affirmation, to a given state of facts.[2] This is the meaning of the word as used here, and the speaker calls upon the king to corroborate him, or bear witness, that the glove he had was the glove given him by the king.

Sec. 263. Martial law.—

"*Flu.* An please your majesty, let his neck answer for it, if there is any martial law in the 'orld."[3]

"Martial law" is that military rule or authority, which exists in time of war, and is recognized by the laws of war, as to persons within the scope of active military operations, in so far as it may be necessary, in order to fully carry on the purposes or objects of the war.[4] Martial law,

[1] Henry V, Act IV, Scene VIII.

[2] Bacon, Abr., *Evidence*, (A); 1 Greenleaf, Evid., secs. 98, 328.

[3] Henry V, Act IV, Scene VIII.

[4] 1 Kent's Comm. 377; DeHart Mil. Law, 13-17; O'Brien, Mil. Law, 26, 30; Tyler, Courts Martial, 11, 27, 58, 62, 105.

Basset said to Vernon, in 1' Henry VI, after being struck by the latter: "*Bas.* Villain, thou know'st the law of arms is such,

That, who so draws a sword, 'tis present death:
Or else this blow should broach thy dearest blood."

(Act III, Scene IV.)

in time of war, supersedes and abrogates the civil law, as to those engaged in the war, hence the appeal was properly made here to "martial law," for the punishment of an offender who was engaged in the war himself. It extends to the camp and its environs and to near field and other operations of war and has its basis in actual necessity and the chief military officer is the person who enforces such rules, so the King, in this instance, was the proper authority to ask the punishment of Pistol from.

CHAPTER XXI.

"FIRST PART OF KING HENRY THE SIXTH."

Sec. 264. Homicide.
265. Distraining property.
266. Proclamation.
267. Truant in the Law.
268. Brawl.
269. Outlaw.
270. Contract.
271. Partners.
272. Fighting in King's palace, or presence.
273. *Quid pro quo.*
274. Condemned woman's privilege of pregnancy.
275. Compromise.

Sec. 264. Homicide.—

"*Reig.* Salisbury is a desperate homicide;
He fighteth as one weary of his life.
The other lords, like lions wanting food,
Do rush upon us as their hungry prey."[1]

Homicide is the destruction of the life of a human being, either by himself, or by the act, procurement or culpable omission of another.[2] When the death is caused by the intentional act of the deceased himself, the offender is called *felo de se* and when the death is caused by another it is either justifiable, excusable, or felonious, according to the facts connected with the killing.[3]

To constitute the crime of homicide the person killed must have been entitled to live, and in legal contemplation a soldier of the enemy, in time of war, has no right to his life, but may be killed by the enemy in battle, without the one killing him, being guilty of a homicide.[4] So the

[1] 1' Henry VI, Act I, Scene II.
[2] 1 Hawkins, Pl. Cr. sec. 2; 2 Bishop, Cr. Law, sec. 538.
[3] 1 Hawkins, Pl. Cr. Ch. 8.
[4] 2 Bishop, Cr. Law, *supra.*

killing of the soldiers of France, by the soldiers of England did not amount to a legal homicide, and the speaker in this verse was technically wrong, in so applying this name to lord Salisbury.

Sec. 265. Distraining property.—

"*Glo.* . . . Here's Beaufort, that regards nor God nor king
Hath here distrain'd the Tower to his use."[1]

Distress, at common law, was the taking of a chattel, or other personal property, out of the possession of the owner, into the custody of the party injured, to procure satisfaction for the wrong done.[2] It was resorted to for the purpose of enforcing payment of rent, taxes or other duties, as well as to exact damages for the trespasses of cattle. The remedy is of great antiquity and is said to have dated back to the Gothic nations of Europe, since the Roman Empire and English statutes made various amendments to the remedy since the days of *Magna Charta*.[3]

As the remedy by distress was virtually a taking of the law into the hands of the landlord, or other person entitled

---

Blackstone's definition of homicide, as the "killing of any human creature," is not in strict accordance with the law as presented by other writers, as it leaves out of the definition of the crime that the killing must have been done by another human being. 4 Bl. Comm. 177; 1 Hawkins, Pl. Cr. sec. 2.

Repulsing Richard's suit, Lady Anne tells him, in King Richard III: "*Anne*: If I thought that, I tell thee, homicide, These nails should rend that beauty from my cheeks." (Act I, Scene II.)

Referring to King Richard, in his talk to his troops before the battle Richmond said: "*Richm.* . . . For what is he they follow? truly, gentlemen, a bloody tyrant and a homicide." (Act V, Scene III.)

[1] Henry VI, Act I, Scene III.

[2] 2 Bl. Comm. 6.

[3] Bacon, Abr. *Distress;* 4 Dane, Abr., 126; Taylor's Land. and Ten., sec. 566; Coke, Litt. 317.

to the compensation or redress exacted, it was more or less of a high handed proceeding, considering the property rights of the one whose property was distrained, hence Gloster accuses the bishop of Winchester of resorting to the remedy of distress and of holding the Tower for his own use.

Sec. 266. Proclamation.—

"*May.* Nought rests for me, in this tumultuous strife,
But to make open proclamation:—
Come, Officer, as loud as e'er thou canst."[1]

A proclamation is the act of causing some state matters to be published or made generally known.[2] In English practice, it was also the declaration made by the crier, under the authority of the court, that something was about to be done. There was the proclamation of rebellion, and proclamation of "exigents," known to the old English law, and the proclamation here used comes nearer the latter in its object, for under this proclamation, on the issuance of a writ of *exigent,* a proclamation issued to the officer of the county where the offenders lived and he made three proclamations for the offenders to yield themselves or be outlawed.[3] This is no doubt the threat intended by the Mayor of London, in this instance, in order to preserve the peace.

---

[1] 1' Henry VI, Act. I, Scene III.

[2] Bacon, Abr.; Buller, Nisi Pr. 226; Dane, Abr.; ch. 96a; Brooke, Abr.

[3] Bouvier's Law Dictionary.

York said, in 2' Henry VI: "*York.* . . . as I hear, the king is fled to London, to call a present court of Parliament. Let's pursue him, ere the writs go forth." (Act V, Scene III.)

Hastings orders a proclamation, in 3' Henry VI, as follows: "*Hast.* Sound, trumpet; Edward shall be here proclaim'd:—Come, fellow soldier, make thou proclamation. (*Gives him a paper. Flourish.*)
Sold. (*Reads*) *Edward the Fourth, by the Grace of God,* etc., (Act IV, Scene VII.)

Sec. 267. Truant in the law.—

"*Suff.* 'Faith, I have been a truant in the law;
And never yet could frame my will to it;
And, therefore, frame the law unto my will."[1]

The speaker means to convey by this phrase that he had never followed the investigation of legal matters with any degree of duty or timely application, but had been remiss in his duties in all matters pertaining to the law. In other words, that he had shirked his duty in legal matters, or had idled, loitered and absented himself when legal matters were in issue, instead of applying himself as he ought to have done.

Sec. 268. Brawl.—

"*War.* . . . This brawl to-day,
Grown to this faction, in the Temple garden,
Shall send, between the red rose and the white,
A thousand souls, to death and deadly night."[2]

A brawl is a noisy quarrel, or a tumult commenced by those not careful about the peace or quietude of a neighborhood or of any person. A common brawler, at common law, was one who disturbed the peace of a neighborhood by fighting or quarrelling and was indictable for the maintenance of a nuisance, or for being a nuisance himself.[3] That Warwick's prediction as to the final outcome of the "brawl" that day started between the factions of York and Lancaster is in the nature of a prophecy, is abundantly borne out by the history of the long wars between these two houses.

King Edward asks, in 3' Henry VI: "*K. Edw.* Is proclamation made,—that, who finds Edward, shall have a high reward, and he his life?" (Act V, Scene V.)

[1] 1' Henry VI, Act II, Scene IV.
[2] 1' Henry VI, Act II, Scene IV.
[3] Wharton, Law Lexicon.

Sec. 269. Outlaw.—

"*Win.* And am I not a prelate of the church?
Glo. Yes, as an outlaw in a castle keeps,
And useth it to patronage his theft."[1]

An outlaw, in English law, was one who was put out of the protection or aid of the law, because of his prior unlawful course in life.[2] At common law, a process was sued out against a person who was in contempt of court, for his refusal to be amenable to the court having jurisdiction of his person or his property, and the writ of outlawry issued either in criminal or civil cases.[3]

Gloster accuses the bishop of Winchester of being in contempt of the rightful temporal power and authority of the King and thus in a position of outlawry toward the sovereign.

The Clown is made to say, in Titus Andronicus:
"*Clo.* Why, I am going with my pigeons, to the tribunal plebs, to take up a matter of brawl, betwixt my uncle and one of the emperial's men." (Act IV, Scene III.)

On the mutiny, inspired by Iago, Othello observes:
"Are we turn'd Turks; and to ourselves do that,
Which heaven hath forbid the Ottomites?
For Christian shame, put by this barbarous brawl." (Act II, Scene III.)

He then gives direction to the false Iago:
"Iago, look with care, about the town;
And silence those whom this vile brawl distracted." (idem.)

[1] 1' Henry VI, Act III, Scene I.
[2] Bacon, Abr. *Outlawry;* 3 Bl. Comm. 283, 284.
[3] Coke, Litt. 128; Bacon, Abr.; 3 Bl. Comm. 283. Outlawry in civil cases, in the United States is unknown, and it is very rare that one is outlawed in a criminal case.

Messala tells Brutus, in Julius Caesar: "That by proscription, and bills of outlawry, Octavius, Antony and Lepidus, have put to death a hundred senators." (Act IV, Scene III.)

Sec. 270. Contract.—

"*K. Hen.* O loving uncle, kind duke of Gloster,
How joyful am I made by this contract."[1]

A contract, in law, is an agreement, upon sufficient consideration to do or not to do, some particular thing.[2] Contracts are either express or implied, and an express contract is one where the details and terms of the agreement are fully uttered and agreed to,[3] while an implied contract is one left to the intention of the parties, or such a contract as reason and justice dictate and which, therefore, the law presumes that every man undertakes to perform.[4]

The contract referred to here was rather in the nature of an implied contract, than one expressed in its terms, and of course as keeping the peace would only be the performance of their legal duty, this would be an object imposed upon the parties by law. But the mutual promises by the duke of Gloster and the bishop of Winchester for themselves and their followers, to desist from further disturbances and keep the peace, and drop all past differences and dissensions between them, was in the nature of a contract, or agreement and the ratification of such an undertaking gave the king much pleasure.

---

[1] 1' Henry VI, Act III, Scene I.

[2] Lawson on Contracts (2' ed.), sec. 1; 1 Parsons Con. sec. 9; 2 Bl. Comm. 446; 2 Kent's Comm. 449; Story, Con. sec. 1.

[3] 2 Bl. Comm. 443.

[4] 2 Bl. Comm. 443; 1 Parson's Com. 4; Lawson, Con.(2d ed.) sec. 3.

King Henry VI, replying to the proffered offer of the daughter of the earl of Armagnac, in marriage, said: "*K. Hen.* In argument and proof of which contract, bear her this jewel, pledge of my affection." (Act V, Scene I.)

In urging Charles to agree to the terms of the peace imposed, in 1' Henry VI, Reignier said: "*Reig.* My lord, you do not well, in obstinacy, To cavil, in the course of this contract." (Act V, Scene IV.)

Sec. 271. Partners.—

"*Bur.* My vows are equal partners with thy vows.

. . . . . .

Bed. . . . Here will I sit, before the walls of Rouen,
And will be partner of your weal or woe."[1]

Partners are those who enter into an agreement to use their labor, skill, or means, in the furtherance of some lawful commerce or business, under an understanding, express or implied from the nature of the enterprise, that there shall be community of the profits or earnings of the undertaking.[2] In the agreement for the partnership, there may be an equal or unequal distribution of the earnings of the partnership, according to the amount contributed by each of the partners,[3] hence Talbot declares that his vows will be "equal partners" with those of his associate in arms, clearly noting this distinction, in law, between one who shares the earnings only in proportion to his contributions and one who shares them equally with his co-partners.

Gloster urges the King, in 1' Henry VI: "*Glo.* . . . You know, my lord, your highness is betroth'd, Unto another lady of esteem; How shall we then, dispense with this contract, And not deface your honor with reproach?" (Act V, Scene V.)

Juliet tells Romeo, in declaring her love: "Well, do not swear: although I joy in thee, I have no joy of this contract to-night." Act II, Scene II.)

[1] 1' Henry VI, Act III, Scene II.

[2] Collyer, Part. Sec. 2; 1 Lindley, Part., secs. 1, 6; Story, Part secs. 23, 24.

[3] *Ante idem.*

Antony tells Caesar, in Antony and Cleopatra: "*Ant.* . . . I, your partner in the cause, 'gainst which he fought, Could not with graceful eyes, attend these wars." (Act II, Scene II.)

Tarquin tells the poor Lucrece:

"That done, despitefully I mean to bear thee
Unto the base bed of some rascal groom,
To be thy partner in this shameful doom." (670, 672.)

And Lucrece reflects that she would then have

"co-partners in my pain." (789.)

Sec. 272. Fighting in King's palace or presence.—

"*Basset.* Villain, thou know'st the law of arms is such,
That who so draws a sword, 'tis present death,
Or else this blow should broach thy dearest blood."[1]

Basset here refers to the ancient law, which obtained in England, prior to the Norman Conquest, whereby fighting in the king's palace, or in his presence, or in that of his judges, was made a felony punishable by death.[2] By statute (33 Henry VIII, c. 12) bloodshed and malicious strikings, whereby blood was shed, in the palaces or houses of the king, while he was personally resident there, was made a felony, for which the offender should have his right hand struck off and for declaration of the solemn circumstance of this execution, the statute assigned different functions to the different members of the king's household, in order to terrorize the populace and prevent such grievous offenses.[3]

Sec. 273. Quid pro quo.—

"*Suff.* Lady, wherefore talk you so?
Mar. I cry you mercy, 'tis but *quid* for *quo*."[4]

Quid pro quo, from the Latin, meaning an equivalent, denotes, in law, the consideration in a contract, for which something is to be done or not done, by the promisor.[5] Of course the terms are used by Margaret in a jocular or humorous manner.

---

[1] 1' Henry VI, Act III, Scene IV.

[2] I Reeve's History Eng. Law, 198.

[3] IV Reeve's History Eng. Law, p. 453; Rolfe's 1' Henry VI, p. 202, notes.

This barbarous judgment, by the lopping off of the right hand, we are told, was actually executed upon Sir Edmund Knivet, during the reign of Henry VIII, for striking a man, at Greenwich, the King then being there. (IV Reeve's History Eng. Law, p. 454). But this statute which imposed this punishment was repealed by 9' Geo. IV, c. 31. *idem.*

[4] 1' Henry VI, Act V, Scene III.

[5] Coke Litt. 47b.

Sec. 274. Condemned woman's privilege of pregnancy.—

"*Puc.* Will nothing turn your unrelenting hearts?—
Then, Joan, discover thine infirmity;
That warranteth by law to be thy privilege.—
I am with child, ye bloody homicides:
Murder not then the fruit within my womb,
Although ye hale me to a violent death."[1]

Joan of Arc here claimed the common law privilege, which was extended in all cases, to a pregnant woman, condemned to death, provided she was found to be with "quick child," of having her execution delayed until the birth of her child. When this plea was made prior to execution, the court directed a jury of twelve matrons, or discreet women, to ascertain the fact if the condemned woman was "quick with child," and if the verdict was that she was with quick child, the execution was stayed from term to term of court, until the child was born, or the woman was found to have been pretending pregnancy.[2] By the English common law, however, the plea would fail, if it was not found that the child had quickened, for until this period the foetus was not believed to be alive.[3] But by the law of Scotland and of France, it was held to be a good plea, when the woman was found to be pregnant, whether the child had quickened or not, and hence, the plea of the Maid of Orleans, in this instance, if she was really pregnant, ought to have stayed her execution, if the law of the realm was accorded her.[4]

---

[1] 1' Henry VI, Act V, Scene IV.

[2] 4 Sh. Bl. Comm. 394, 395; 1 Bishop, Cr. Proc., secs. 1322, 1324.

[3] Reg vs. Baynton, 14 How. St. Tr. 597, 634.

[4] Bouvier's Law Dictionary; 1 Chitty's Cr. Law, 760.

Chitty states that while the common law did not give a stay, unless the child had quickened, the matrons, because of their "gentleness of sex," usually found that the child had quickened and thus avoided the execution of one of their sex, at their hands. 1 Chitty, Cr. Law, 760; 3 Inst. 17; 4 Bl. Comm. 695; 1 Hale, P. C. 368, 369.

Sec. 275. Compromise.—

"*York.* . . . And, now the matter grows to compromise,
Stand'st thou aloof upon comparison."[1]

A compromise is an agreement between two or more parties as a settlement of matters in dispute between them.[2] Frequently compromises are brought about by arbitrators, with authority to decide what shall appear to be just and reasonable between the parties, in order to put an end to the differences of which they are made the judges.[3]

Of course in negotiations for a compromise, if either party is arbitrary, or not willing to make concessions to the other, to settle the disputed matters, then no compromise can generally be procured and this is why York suggests to the French Dauphin, that he must not stand "aloof upon comparison," "now the matter grows to compromise."

In an early South Carolina case, a jury of matrons stayed the execution of a pregnant woman, according to this old practice. State vs. Arden, 1 Bay, 487, 490.

[1] 1' Henry VI, Act V, Scene IV.
[2] Bouvier's Law Dictionary.
[3] *ante idem.*

CHAPTER XXII.

"SECOND PART OF KING HENRY THE SIXTH."

Sec. 276. Articles of agreement.
277. Bargain and sale.
278. Margery Jourdemayn's case.
279. Pursuivant.
280. Bondman.
281. Open to the Law.
282. "Rigour of the Law."
283. To apprehend in the fact.
284. York's title to the Crown of England.
285. Duchess' of Gloster's sentence.
286. Justification for one condemned by Law.
287. Contrary to form of Law.
288. Levying sums of money.
289. Taking bribes.
290. Taxes—Restitution.
291. Bearing false witness—Perjury.
292. Executioner.
293. Land held in common.
294. Sales of meat during Lent.
295. Source of Law—Biting statutes.
296. Jurisdiction regal.
297. Benefit of Clergy.
298. Determining causes.
299. Maiden rent.
300. Bail.

Sec. 276. Articles of agreement.—

"*Suff.* My lord protector, so it please your grace,
Here are the articles of contracted peace,
Between our sovereign and the French king, Charles,
For eighteen months, concluded by consent."[1]

Articles are the divisions of a written or printed document or agreement and in the sense in which the term is here used it is the specification of the distinct matters

[1] 2' Henry VI, Act I, Scene I.

agreed upon.[1] The fundamental idea of an article is that of an object comprising some part of a complex whole, such as the statement of the several undertakings of the several parties to an agreement, covering the different contingencies of the terms of the contract.[2]

The contract here contains the legal essentials of a valid agreement commencing with the names and designation of the parties, the subject matter of the agreement, containing the essentials of the undertakings of each party; the covenants to be performed and the signatures of the parties to the agreement.[3]

---

[1] Bouvier's Law Dictionary.

[2] *Ante idem.*

[3] The Poet, however, described the person of the agent, rather than the principal for whom the contract is made. In this form, it is but the agreement of Suffolk, as the additions after his name, in law, would be but mere *descriptio personae.* An agreement should be executed by an agent in the name of his principal, by himself, as agent, rather than in the name of the agent, as a party thereto.

Gloster reads this peace agreement, as follows: "*Glo. Imprimis, It is agreed between the French King, Charles, and William de la Poole, marquis of Suffolk, ambassador for Henry, King of England, that the said Henry shall espouse the Lady Margaret,*" etc. . . . "*Item. It is further agreed between them,*" etc. 2' Henry VI, Act I, Scene I.

The earl of Westmoreland said, on Henry's attempted disposition of the crown, in 3' Henry VI: "*West.* I cannot stay to hear these articles." (Act I, Scene I.)

Speaking of the form of the French treaty, Buckingham said of Cardinal Wolsey: "*Buck.* Pray, give me favor, sir. This cunning cardinal, The article o' the combination drew, as himself plead'd." (Henry VIII, Act I, Scene I.)

The Earl of Surrey tells the duke of Norfolk, when they are presenting their charges against Cardinal Wolsey, in King Henry VIII: "*Sur.* Produce the grand sum of his sins, the articles collected from his life." (Act III, Scene II.)

In Coriolanus, Cominius said: "*Com.* . . . send us to Rome, the best, with whom we may articulate, for their own good, and

Sec. 277. Bargain and sale.—

"*York.* . . . So York must sit, and fret, and bite his tongue,
While his own lands are bargain'd for and sold."[1]

A contract of bargain and sale, is one whereby the owner of land, for a valuable consideration, agrees to sell to the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by the statute of uses.[2] In other words, the statute of uses annexed the seisin to such an agreement, whereby a complete estate became vested in the bargainee.[3] All things for the most part which may be granted by any deed, may be granted by bargain and sale and an estate may be created in fee, for life or for years, by such a deed.[4] The proper and technical words to denote a bargain and sale are "bargain and sell," as used by the Poet here, but from the language of the verse quoted, an involuntary alienation is contemplated by York, which could only occur after the title was divested by confiscation or other means, before the bargain and sale occurred.[5]

---

ours." This means he would enter into articles with him. (Act I, Scene IX.)

Antiochus tells Pericles, Prince of Tyre, when he sees that he has discovered his sin:

"*Ant.* Prince Pericles, touch not, upon thy life,
For that's an article within our law,
As dangerous as the rest." (Act I, Scene I.)

[1] 2' Henry VI, Act I, Scene I.

[2] Tiedeman, on R. P. (3' ed.) secs. 542, 543.

[3] Coke, Litt. 40b; 2 Bl. Comm. 338.

[4] 2 Coke, 54.

[5] In other words, this deed is a contract, to which the land owner would have to assent. Tiedeman, on R. P. (3' ed.) sec. 543.

Sec. 278. Margery Jourdemayn's case.—

"*Duchess.* What say'st thou, man? hast thou as yet conferr'd
With Margery Jourdain, the cunning witch,
With Roger Bolingbroke, the conjuror?
And will they undertake to do me good?"[1]

These lines refer to a case tried during the tenth year of King Henry VI, wherein Margery Jourdemayn, John Virley, clerk, and friar John Ashwell were, on the 9th of May, 1433, brought from Windsor by the constable and committed for sorcery, before the Council at Westminster.[2] Afterwards, by order of the Council, they were delivered to the custody of the Lord Chancellor of the Kingdom, but the woman was afterwards burned at Smithfield, as stated at the time in the chronicles, as well as in the play.[3]

Sec. 279. Pursuivant.—

"*Suff.* . . . Take this fellow in, and send for his master with a pursuivant presently:—we'll hear more of your matter before the king."[4]

A pursuivant, from the French, *poursuivant,* meaning a follower, was the third and lowest order of heraldic officers. This office was rather a probationary one, through which heralds or kings-at-arms, had to pass.[5] In ancient times, any nobleman of great prowess could name his own pursuivant and the dukes of Norfolk, Northumberland and the earl of Salisbury, each had his own pursuivant.

---

[1] 2' Henry VI, Act I, Scene II.

[2] Rolfe's 2' Henry VI, p. 187, notes.

[3] Rymer's Faedera, p. 166. See, also, III Reeve's History Eng. Law, pp. 453, 551.

And for history of the statutes against sorcery and witchcraft, even as late as the reign of Queen Elizabeth, see V Reeve's History Eng. Law, p. 349.

[4] 2' Henry VI, Act I, Scene III.

[5] Hume's History of England.

The costume of a pursuivant of the king was a surcoat, embroidered with the royal arms, and worn with one sleeve hanging down in front, and another behind the back, but of more recent years the costume of such officers is like that of a herald.

Sec. 280. Bondman.—

"*Suff.* . . . And all the peers and nobles of the realm,
Have been as bondmen to thy sovereignty."[1]

Bondman is a term which has not obtained a strictly juridical use, distinct from the vernacular, but it is generally used to indicate one compelled to render personal servitude and it is not to be used in the same sense as the word slave. A slave is an object of property and is possessed and owned as a chattel or thing, while a bondman, although standing in such relation to the party entitled to his services, possesses otherwise, such legal rights as any

There are four pursuivants belonging to the English College of Arms: *Rouge Croix*, the oldest, so named from the cross of St. George; *Blue Mantle*, instituted either by Edward III, or Henry V, and named from the color of the Order of the Garter; *Rouge Dragon*, named from Henry VII's dexter supporter, a red dragon, and *Portcullis*, named from a badge of the same king.

A Pursuivant and Lord Hastings, have the following colloquy, in King Richard III:

"*Hast.* Gramercy, fellow: There, drink that for me. (Throwing him his purse.)

Purs. I thank your honour." (Act III, Scene II.)

King Richard bids Ratcliff, in Richard III: "*K. Rich.* Send out a pursuivant at arms to Stanley's regiment." (Act V, Scene III.)

Doctor Butts said, in King Henry VIII, speaking of the treatment accorded Cranmer, by the peers, before his trial: "*Butts.* There, my lord, The high promotion of his grace, of Canterbury; Who holds his state at door 'mongst pursuivants, pages, and footboys." (Act V, Scene II.)

[1] 2' Henry VI, Act I, Scene III.

individual may possess, in law and he does not occupy a mere property *status*.[1] The Hebrews, for instance, held the people of other nations as slaves, possessing the attitude of mere property; but those of their own nation, under the obligation to serve, were rather held as bondmen, possessing certain legal rights, as persons, not as property.[2] This was rather the legal attitude of the *villeins*, under the serfdom which existed in feudal times, and regardless of the nature of his service, the villein, under English law, was a legal person, capable of legal rights.[3] The term is here used, to indicate persons in one degree above mere slaves, or serfs, but compelled to render service as the sovereign might demand, or, in this respect, to occupy the attitude of "bondmen."

Sec. 281. Open to the law.—

"*Glo.* . . . As for your spiteful false objections,
Prove them and I lie open to the law."[4]

Gloster here demands a trial and admits, that, upon the proof of the several offenses charged against him, he would be amenable to the law. In other words, he asks to put his accusers to their proof and demands the evidence of his guilt, admitting that if the things charged against him, shall be established, he has violated the law and is amenable for his offenses. The objections or charges are not admitted, but are claimed to be "spiteful false objections," but if true, then the speaker admits, "I lie open to the law."

---

[1] 1 Hurd, Law of Freedom and Bondage, chs. 4, 5.

[2] Cobb's Hist. Sketch, Ch. 1.

[3] 1 Hurd's Law of Freedom & Bondage, chs. 4, 5.

Casca said in Julius Cæsar: "*Casa.* So every bondman in his own hand bears the power to cancel his captivity." (Act I, Scene II.)

[4] 2' Henry VI, Act I, Scene III.

Sec. 282. "Rigour of the law."—

"*York.* . . . I do beseech your majesty,
Let him have all the rigour of the law."[1]

Rigour is here used in the sense of exactness, strictness, severity or inflexibility. In other words, York demands of the King that the law, in all its strictness shall be enforced, without compassion or indulgence. He demands that the King shall be firm and rigid in the enforcement of the law; that no mercy be shown, but that the most rugged sternness, or relentless severity shall be employed in the enforcement of the law.[2]

Sec. 283. To apprehend in the fact.—

"*Buck.* . . . The ringleader and head of all this rout,—
Have practic'd dangerously against your state,
Dealing with witches and with conjurors;
Whom we have apprehended in the fact."[3]

To be "apprehended in the fact," is to be arrested on a criminal charge, while in the commission of the crime.[4] Apprehend is used in speaking of arrests on criminal charges, while arrest is used in speaking of civil offenses, not criminal in nature. In other words, one may make an arrest on civil process, while one can only be apprehended on a criminal warrant,[5] so the correct legal term is used by the Poet. Factum, is a culpable or criminal act,

[1] 2' Henry VI, Act I, Scene III.

[2] The same term is used, in a different meaning, by the good queen Hermione, at her trial, when she asks not mere sternness or severity and says:

"If I shall be condemn'd
Upon surmises, . . . I tell you,
'Tis *rigour* and not law."
(Winter's Tale, Act III, Scene II.)

[3] 2' Henry VI, Act II, Scene I.

[4] Bouvier's Law Dictionary.

[5] Bacon's Abr.; Bouvier's Law Dictionary.

or one not lawful in itself,[1] so to be apprehended, in the fact, is to be taken "red handed," or while in the commission of the crime.

Buckingham caught the Duchess of Gloster, in the presence of the witches and while enquiring about the several treasonable matters charged and thus, she was taken or "apprehended in the fact."

Sec. 284. York's title to the crown of England.—

"*York.* . . . Edward the Third, my lords, had seven sons;
The first, Edward the Black Prince, prince of Wales;
The second, William, of Hatfield; and the third,
Lionel, duke of Clarence; next to whom,
Was John of Gaunt, the duke of Lancaster:
The fifth was Edmund Langley, duke of York;

[1] 2 Bl. Comm. 293, 295.

Paris attempts to apprehend Romeo, who is entering the tomb of the Capulets, in Romeo and Juliet, as follows:

"*Par.* Stop thy unhallow'd toil, vile Montague;
Can vengeance be pursu'd further than death?
Condemn'd villain, I do apprehend thee:
Obey and go with me; for thou must die.'

Apprehend, in its strictest sense, applies to taking one into custody, in a criminal case. An arrest could be made, at common law, by a private person, for a crime committed in his presence, and especially as here, where he was taken in the act. Paris apprehends Romeo, in the act of breaking the enclosure to the Capulet tomb; he demands that he stop his "unhallow'd toil;" Romeo has also been adjudged guilty of Tybalt's murder and banished, not to return, on pain of death, so Paris, as he had a legal right to do, arrests him, and assures him he must now pay the penalty of violating the Prince's judgment, when he was banish'd. (Act V, Scene III.)

See Bouvier's Law Dictionary.

Brabantio, in Othello, gives the following direction: "Some one way, some another.—Do you know where we may apprehend her and the Moor?" (Act I, Scene I.)

And when he comes up with Othello, he addresses him as follows: "*Bra.* . . . I therefore apprehend and do attach thee," etc. (Act I, Scene II.)

The sixth, was Thomas Woodstock, duke of Gloster;
William of Windsor was the seventh, and last.
Edward, the Black Prince, died before his father;
And left behind him, Richard, his only son,
Who, after Edward the Third's death, reign'd as king;
Till Henry Bolingbroke, duke of Lancaster,
The eldest son and heir of John of Gaunt,
Crown'd by the name of Henry the Fourth,
Seiz'd on the realm; depos'd the rightful king;
Sent his poor queen to France, from whence she came,
And him to Pomfret; where, as all you know,
Harmless Richard was murder'd traitorously.

War. Father, the duke hath told the truth;
Thus got the house of Lancaster the crown.

York. Which now they hold by force and not by right;
For Richard, the first son's heir, being dead,
The issue of the next son should have reign'd.

Sal. But William of Hatfield died without an heir.

York. The third son, duke of Clarence (from whose line
I claim the crown,) had issue—Phillippe, a daughter,
Who married Edmund Mortimer, earl of March:
Edmund had issue—Roger, earl of March:
Roger had issue—Edmund, Anne, and Eleanor.

Sal. This Edmund, in the reign of Bolingbroke,
As I have read, laid claim unto the crown;
And, but for Owen Glendower, had been king,
Who kept him in captivity till he died.
But, to the rest.

York. His eldest sister, Anne,
My mother, being heir unto the crown,
Married Richard earl of Cambridge; who was son
To Edmund Langley, Edward the Third's fifth son.
By her I claim the kingdom: she was heir
To Roger, earl of March; who was the son,
Of Edmund Mortimer; who married Phillippe,
Sole daughter unto Lionel, duke of Clarence;
So, if the issue of the elder son,
Succeed before the younger, I am king.

War. What plain proceedings are more plain than this?
Henry doth claim the crown from John of Gaunt,
The fourth son; York claims it from the third.
Till Lionel's issue fails, his should not reign."[1]

---

[1] 2' Henry VI, Act II, Scene II.

This descent of the Duke of York is, as history gives it, and according to the English law, was a better title to the crown of England than that of the house of Lancaster. Richard of York was the son of the earl of Cambridge, beheaded by Henry the Fifth for asserting his claim to the crown; his mother, Anne, the heiress of the Mortimers, and thus his title to the crown, as the descendant of the third son of Edward the Third, Lionel, of Clarence, was stronger, in law, than that of Henry VI, a descendant of John of Gaunt, the fourth son.[1] York was the issue of the elder son, and since, in law, such issue would succeed, before that of the younger son, as the Poet presents it, his claim was the stronger to the crown.[2]

Sec. 285. Duchess of Gloster's sentence.—

"*K. Hen.* Stand forth, dame Eleanor Cobham, Gloster's wife;
In sight of God, and us, your guilt is great;
Receive the sentence of the law, for sins
Such as by God's book, are adjudg'd to death.

. . . . . .

You, madam, for you are more nobly born,
Despoiled of your honor in your life,
Shall, after three days open penance done,
Live in your country here, in banishment,
With sir John Stanley, in the Isle of Man."[3]

The usual practice of having the prisoner "stand forth," to receive the sentence, is here adopted. Like Grotius,[4] the Poet here makes the King conclude that capital punishment, in cases of treason and murder, are not only lawful, under the divine law, but indispensable to restrain

[1] 1' Greene's England, pp. 561, 564.

[2] The right of primogeniture, or the superior claim of the elder son, has been recognized, in England, ever since the reign of Henry II. I Reeve's History Eng. Law, pp. 254, 255.

[3] 2' Henry VI, Act II, Scene III.

[4] De Jure Belli, b. 2, c. 20.

the audaciousness of guilt, as the Scripture recognizes that "all that a man hath, will he give for his life."

The King assumes the attitude of the Judge pronouncing sentence—which is the judgment or judicial declaration of the court assessing the prisoners punishment—when he tells the Duchess to "receive the sentence of the law," but of course the evidence of the Duchess' guilt is not established as it should have been, in a court of justice, nor is the offense one in magnitude sufficient to constitute treason, had she been accorded a fair trial.

Sec. 286. Justification for one condemned by law.—

"*Glo.* Eleonor, the law, thou seest, hath judged thee;
I cannot justify whom the law condemns."[1]

Gloster here bows in humble submission to the decree of the law, in pronouncing punishment upon his wife. These lines show a beautiful respect for the majesty and might of law, in the abstract and this is in keeping with all the references which his characters show to the mandates of the law, after the law is applied to the rights of the litigants that the Poet introduces. Gloster did not assume to raise his right to judge one upon whom the law had already judged, or claim the prerogative to usurp the judgment seat. "The law, thou see'st hath judged thee." Not the King, as such, but the King, as the

---

Eleanor Cobham, the mistress of Humphrey, duke of Gloster, became his wife in 1440 and in 1441, she with Roger Bolingbroke, a priest, was seized for conspiracy in a plot to encompass the King's death, by sorcery. On Bolingbroke's arrest, she fled to a sanctuary, at Westminster. "Her judges found that she had made a waxen image of the King and slowly melted it at a fire, a process which was held to account for Henry's growing weakness, both of mind and body. The Duchess was doomed to penance for her crime; she was led bare-headed and bare-footed in a penance-sheet through the streets of London, and then thrown into prison for life." 1' Greene's England, pp. 562, 563.

[1] 2' Henry VI, Act II, Scene III.

mouthpiece of the law, had spoken and the law was higher and more sacred than the king, even; the law, itself had pronounced judgment. No man should question its high decrees.

In the history of the trial by battle, when females were accused, their male friends or relatives, acting as justificators, or compurgators, by their oaths, had the right to justify the female accused and to stand in their place, upon their oaths, in the wager of the law.[1] But this could not be done, after judgment pronounced, so Gloster here, could only let the law take its course and he would not "justify whom the law condemns."

Sec. 287. Contrary to form of law.—

"Car. Did he not, contrary to form of law,
Devise strange deaths for small offences done?"[2]

The Cardinal here, no doubt, refers to the provision of *Magna Charta,*[3] providing that amercement of a freeman for a fault, shall be proportionate to his crime and not excessive. Death, "for small offenses done," would certainly be contrary to the "form of law," at the time to which the play refers.[4]

---

[1] Hale, Hist. Com. Law, 188; 3 Sh. Bl. Comm. 337.

In making his peace with the world, before his execution, Buckingham said in King Henry VIII: *"Buck.* The law I bear no malice for my death, It has done, upon the premises, but justice." (Act II, Scene I.)

[2] 2' Henry VI, Act III, Scene I.

[3] *Magna Charta,* C. C. 14, 29.

[4] This repository of the rights of Englishmen was wrung from King John, by his barons, on the 19th of June, 1215, on the little island in the Thames, within the county of Buckinghamshire, which is still called *Magna Charta Island.* Coke, 2' Inst.; 4 Sh. Bl. Comm. 423; Bouvier's Law Dictionary.

For history of *Magna Charta,* and the details and scope of its different provisions, the reader is referred to the excellent article thereon, in II Reeve's History Eng. Law, pp. 16-50.

Sec. 288. Levying sums of money.—

"*York.* And did he not, in his protectorship,
Levy great sums of money through the realm,
For soldiers pay in France and never sent it."[1]

Levy, in the sense in which it is here used, means to raise, i. e., Gloster, during his protectorship, is charged with having raised money, through the realm, for the pay of soldiers and then not sent it for this purpose. Levy, in law, is also used in the way of a seizure, as where money is raised from a seizure of property for a lawful purpose. The term always contemplates that the levy is made by lawful authority, for otherwise the payment could not be enforced by the levy.[2]

Sec. 289. Taking bribes.—

"*York.* 'Tis thought, my lord, that you took bribes of France,
And, being protector, stayed the soldier's pay;
By means whereof, his highness hath lost France."[3]

The giving or receiving of a bribe, is the acceptance or offering of any undue reward, by or to any person, whose ordinary profession or business relates to the administration of justice, in order to influence his behavior

---

Gloster tells the Mayor, in King Richard III: "*Glo.* What: think you, we are Turks, or infidels? Or that we would, against the form of law, Proceed thus rashly in the villain's death?" (Act III, Scene V.)

Menenius tells the tribunes of the people, after Coriolanus' summary condemnation: "*Men.* Give me leave, I'll go to him, and undertake to bring him where he shall answer, by a lawful form, (In peace) to his utmost peril." (Act III, Scene I.)

Cornwall, in King Lear, in ordering the arrest of Gloster, said: "*Corn.* Pinion him like a thief, bring him before us.
Though well we may not pass upon his life,
Without the form of justice." (Act III, Scene VII.)

[1] 2' Henry VI, Act III, Scene I.
[2] 2 Bl. Comm. 357; 4 Bl. Comm. 81.
[3] 2' Henry VI, Act III, Scene I.

in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity.[1]

For Gloster to have accepted money from a foreign nation, at war with his own country, while acting as protector of the realm, would of course be accepting a bribe, if the effect or object was to incline the party receiving the money to fail in the performance of his duty to his own country; but of course there was no foundation, in fact, for this charge against the good Duke Gloster, but the charge was a mere subterfuge, as the Poet makes plain.

---

[1] Coke, 3' Inst., 147, 149; 4 Bl. Comm. 139; 1 Russell, Cr. 156.

Replying to the charges against him, Gloster said, in 2' Henry VI: "*Glo.* . . . I never robb'd the soldiers of their pay, Nor never had one penny bribe from France." (Act III, Scene I.)

Apemantus, the philosopher, in Timon of Athens, tells Timon, when he offers him good treatment: "*Apem.* If I should be brib'd too, there would be none left to raill upon thee; and then thou would'st sin the faster." (Act I, Scene II.)

Pleading for his client, in Timon of Athens, Alcibiades said: "*Alciab.* . . . his service done at Lacedaemon and Byzantium, were a sufficient briber for his life." (Act III, Scene V.)

Caius Marcius tells Cominius, in Coriolanus: "*Mar.* I thank you, general, But cannot make my heart consent to take a bribe to pay my sword." (Act I, Scene IX.)

Cassius tells Brutus, in Julius Cæsar:

"*Cas.* That you have wrong'd me, doth appear in this;
You have condemn'd the noted Lucius Pella,
For taking bribes here of the Sardians." (Act IV, Scene III.)

And Brutus replies:

"*Bru.* What, shall one of us,
That struck the foremost man in all this world,
But for supporting robbers; shall we now
Contaminate our fingers with base bribes?"
(Act IV, Scene III.)

In Cymbeline, Belarius observes:

"O, this life
Is nobler than attending for a check,
Richer than doing nothing for a bribe,
Prouder than rustling in unpaid-for silk."
(Act III, Scene III.)

Sec. 290. Taxes.—Restitution.—

"*Glo.* . . . No. Many a pound of mine own proper store,
Because I would not tax the needy commons,
Have I disbursed to the garrisons,
And never ask'd for restitution."[1]

A tax is a contribution, imposed by the government, upon the individual citizen of a country, for the service of the state.[2] The commons, were those subjects of the English nation who were not noblemen.[3] Restitution is a legal term, meaning the return of property or money to one lawfully entitled thereto.[4]

Gloster denies that he levied unusual assessments against the subjects, but claims that he waived the taxes due for the wars and made advancements from his own store, to relieve the commons, without asking that it be returned to him.

Sec. 291. Bearing false witness.—Perjury.—

"*Glo.* . . . I shall not want false witness to condemn me,
Nor store of treasons to augment my guilt:
The ancient proverb will be well effected,—
A staff is quickly found to beat a dog."[5]

A witness is one who testifies under oath to that which he knows to be true.[6] A false witness, of course, would

---

In Venus and Adonis, it is said: "And therefore hath she bribed the Destinies, To cross the curious workmanship of nature." (733, 734.)

[1] 2' Henry VI, Act III, Scene I.

[2] 1 Bl. Comm. 308; 1 Kent's Comm. 254.

[3] Bouvier's Law Dictionary.

[4] *Ante idem.*

King Henry VIII asks Cardinal Wolsey: "*K. Hen.* Taxation? Wherein? and what taxation?—My lord cardinal, you that are blam'd for it alike with us, know you of this taxation." (Act I, Scene II.)

[5] 2' Henry VI, Act III, Scene I.

[6] Bacon, Abr. *Evidence;* 1 Greenleaf, Evid., secs. 98, 328.

be one testifying to facts not known to be true, or to those that were false.

Gloster knows the prejudice obtaining against him and advises his accusers that he knows they will invent charges to accomplish his overthrow and establish his guilt by false witnesses.

Sec. 292. Executioner.—

"*Car.* . . . . Say, you consent, and censure well the deed,
And I'll provide his executioner,
I tender so the safety of my liege."[1]

Executioner, in law, is the one who puts criminals to death, according to their sentence.[2] A hangman, in the United States, is such a person. The Cardinal, upon the excuse of his solicitation for the King, agrees to provide Gloster's "executioner," if the Queen and Suffolk consent and think well of the act.

Sec. 293. Land held in common.—

"*Cade.* . . . I will make it felony to drink small beer: all the realm shall be in common, and in Cheapside shall my palfry go to grass."[3]

The Prince tells Richard, in 3' Henry VI: "*Prince.* Lascivious Edward—and thou perjur'd George, . . . I am your betters, traitors that ye are." (Act V, Scene V.)

[1] 2' Henry VI, Act III, Scene I.

[2] Bouvier's Law Dictionary.

King Henry tells Richard, in 3' Henry VI: "*K. Hen.* If murdering innocents be executing, Why, then thou art an executioner." (Act V, Scene VI.)

Lady Anne tells Richard, in King Richard III: "*Anne.* Arise, dissembler; though I wish thy death, I will not be thy executioner." (Act I, Scene II.)

On the approach of the murderers of Clarence, in King Richard III, he is made to say: "*Glo.* . . . But soft, here come my executioners." (Act I, Scene III.)

[3] 2' Henry VI, Act IV, Scene II.

Land held in common, is that held by several people by several and distinct titles, and not by joint deed, but whose occupancy of the land is in common, the only unity recognized between them being that of possession.[1] Tenants in common have a right to share in the profits of the estate, according to the extent of their several interests and all are jointly entitled to the possession of the land so held.[2]

Cade's promise to hold the realm in common, was of course presented for the purpose of securing followers and like other socialistic propagandas, was contrary to established laws.

Sec. 294. Sales of meat during Lent.—

"*Cade.* They fell before thee like sheep and oxen, and thou behavedst thyself as if thou hadst been in thine own slaughter-house; therefore thus will I reward thee: the Lent shall be as long again as it is, and thou shalt have a license to kill for a hundred lacking one."[3]

These lines no doubt refer to the statutes enacted during the reign of Queen Elizabeth, by the terms of which butchers were forbidden under penalty of the statute, to sell meat, during Lent.[4] It was provided, however, that as an exception to the imposition of these terms, a license might issue for the killing and sale of a certain number of beasts, nominally for the sake of those so disabled by sickness that they could not do without it.[5]

This is the meaning Cade gives the statute, as he con-

---

[1] Bacon, Abr., *Tenants in Common;* Coke, Litt. 184b; 2 Bl. Comm. 179, 191; 4 Kent's Comm. 358.

[2] Tiedeman, R. P. (3d ed.), secs. 178, 179.

Cade elsewhere assures his followers: "*Cade.* And henceforward all things shall be in common." (2' Henry VI, Act IV, Scene VII.)

[3] 2' Henry VI, Act IV, Scene III.

[4] V Reeve's History Eng. Law.

[5] Rolfe's 2' Henry VI, p. 219, notes.

strues it, in favor of Dick the butcher, and his followers, for he will, in their special interest, double the period of his disability, but set at naught the impositions of the law and give him and them free reign to kill as they please.

Sec. 295. Source of law—Biting statutes.—

"*Dick.* Only, that the laws of England may come out of your mouth.

. . . . . .

Cade. I have thought upon it, it shall be so. Away, burn all the records of the realm; my mouth shall be the parliament of England.

John. Then we are like to have biting statutes, unless his teeth be pulled out."[1]

As law is but a rule of conduct prescribed by the supreme power,[2] in England, when the monarchy was absolute in form, the king's mouth was the source of law, hence Cade's promise is not so far from the legal right he would have, if he were the absolute monarch of the realm, to make laws at his pleasure. He would burn all the records of the realm and his will be substituted for the acts and regulations of parliament, the law making body, under the form of government then obtaining.

Sec. 296. Jurisdiction regal.—

"*Cade.* Well, he shall be beheaded for it ten times.—Ah, thou say, thou serge, nay, thou buckram lord: now art thou within point-blank of our jurisdiction regal."[3]

Considering the relish of Englishmen for meat, it is great wonder that the Queen had any but sick and disabled citizens, during the Lenten season in view of this enforcement of the statute referred to.

[1] 2' Henry VI, Act IV, Scene VII.

[2] 1 Stephen, Comm. 24, 25.

King Edward tells Clarence, in 3' Henry VI: "*K. Edw.* Ay, what of that? It was my will and grant; And, for this once, my will shall stand for law." (Act IV, Scene I.)

[3] 2' Henry VI, Act IV, Scene VII.

Jurisdiction is the power to hear and determine a cause.[1] Jurisdiction attaches over the person and over the subject-matter of an offense and the court undertaking to determine a cause, must generally be vested with jurisdiction of both kinds. And territorial jurisdiction is the power to determine a given cause, within the territory wherein it is to be decided or tried.[2]

Cade gloats over Lord Say, in these lines, and boasts that he has power both over the subject-matter of his offense by the law of the sovereignty in which his tribunal is held, and also jurisdiction over his person, as he is within the power of the court, or, as the Poet puts it: "now art thou within point-blank of our jurisdiction regal."

Sec. 297. Benefit of clergy.—

"*Cade.* . . . Thou hast most traitorously corrupted the youth of the realm, in erecting a grammar-school: and, whereas, before, our forefathers had no other books but the score and the tally, thou hast caused printing to be used; and, contrary to the king, his crown and dignity, thou hast built a paper mill. It will be proved to thy face, that thou hast men about thee that usually talk of a noun and verb; and such abominable words as no Christian ear can endure to hear. Thou hast appointed justices of the peace, to call poor men before them about matters that they were not able to answer. Moreover, thou hast put them in prison, and because they could not read, thou hast hanged them; when, indeed, only for that cause, they have been most worthy to live."[3]

These lines contain a direct reference to the "benefit of clergy," which was an exemption recognized by the English law, in favor of the culprit demanding it, of the death penalty imposed by the law, for the commission of

[1] Bacon, Abr., *Courts;* Thach. Cr. Cas. 202; 6 McLean, C. C. 355.
[2] Bouvier's Law Dictionary.
[3] 2' Henry VI, Act IV, Scene VII.

certain offenses. A milder form of punishment was substituted for that provided for by law, in favor of those entitled to such benefit.[1]

A clergyman was exempt from capital punishment as often as he repeated the offense; but the laity, provided they could read, were exempted only for the first offense, but peers or peeresses were discharged for their first offense, without any reading at all, or any punishment being inflicted, but women commoners had no right to invoke the benefit of clergy. Instead of the punishment provided by law as to commoners who could read, a substituted punishment of burning the hand, was assessed under this privilege. Although the benefit of clergy originally extended only to the clergy, in time it came to be extended to all who could read, whether clergymen or not.[2] This privilege, however, was never extended to those guilty of treason, or of misdemeanors inferior to felony.[3]

Cade construed the inability to read as constituting the offense for which the subjects had been put to death, but his harangue, although wrong, was no doubt intended, by the Poet, to present the injustice of such a plea; merely because a man was unable to read, he was punished—regardless of the irrelevancy of such fact to his guilt or innocence—while one possessing this accomplishment, was subjected to a lighter form of punishment, or allowed to go free. This plea was evidently abhorrent to the Poet's sense of justice.

---

[1] 1 Chitty, Cr. Law, 667-668.

[2] 4 Bl. Comm. ch. 28.

[3] 1 Bishop's Cr. Law, secs. 622-624.

This privilege, improperly given to the clergy and others possessing learning, was abolished by statute, in England, by 7 Geo. IV, c. 28. And the benefit of clergy was abolished by Act of Congress as to offenses punishable with death, in 1790.

Cade attempted to reverse the law and make the benefit of

clergy a crime, instead of a defense, as evidenced by the following:

"*Cade.* Here's a villain.

Smith. H'as a book in his pocket, with red letters in it.

Cade. Nay, then he is a conjuror.

Dick. Nay, he can make obligations and write court-hand.

Cade. I am sorry for't: the man is a proper man, on mine honour: unless I find him guilty, he shall not die,—Come, hither, sirrah, I must examine thee; What is thy name?

Clerk. Emanuel. . . .

Cade. Dost thou use to write thy name? or hast thou a mark to thyself, like an honest plain dealing man?

Clerk. I thank God, Sir, I have been so well brought up, that I can write my name.

All. He hath confessed: away with him, he's a villain and a traitor.

Cade. Away with him, I say; hang him with his pen and inkhorn about his neck." (2' Henry VI, Act IV, Scene II.)

Lord Say was also pronounced a traitor, because he could speak French. (idem.)

And Dick, the butcher, said: "The first thing that we do, let's kill all the lawyers." (Act IV, Scene II.)

In 2' Henry VI, Dick, the butcher, a follower of Cade, is made to say: "*Dick.* But, methinks, he should stand in fear of fire, being burnt i'the hand for stealing of sheep." (Act IV, Scene II.)

For interesting cases, wherein this privilege was invoked in the English courts, see 1 Salk. 61; Hale's Pleas of the Crown, by Amos, p. 24; Kelyng's Rep. (18 Car. 11.)

Reeves, in his History of English Law, thus describes how the benefit of clergy was taken away from accessories before the fact in case of murder and other crimes, during the reign of Philip and Mary: "The statute of Edw. VI, which took away clergy from the principals in murder, had left accessories to enjoy the capacity they derived at common law from the benefit of clergy. It happened, in 3' and 4' Phillip and Mary, that one Smith had hired two persons to murder one Rufford. The wife of Rufford petitioned the House of Commons that Smith might, by act of Parliament, be deprived of his clergy. Upon this the Commons sent to the Queen, praying that she would order Smith to be brought from the Tower to the bar of the house. He was accordingly brought and the other parties confessing the whole matter, and Smith at length doing the same, the bill was passed.

Sec. 298. Determining causes.—

"*Say.* Long sitting to determine poor men's causes
Hath made me full of sickness and diseases."[1]

Determining poor men's causes, was the function that Lord Say complains had brought upon him the diseases that he was afflicted with. A cause, is used in the sense of a cause of action, which accrues to a person when a wrong has been committed, or a duty violated. As one of the justices in eyre of the realm, it had been the duty of Lord Say to go over the kingdom, yearly, to hear the causes of the subjects[2] and this, he claimed, had broken down his health.

Sec. 299. Maiden rent.—

"*Cade.* . . . The proudest peer in the realm shall not wear a head on his shoulders, unless he pay me tribute; there shall not a maid be married, but she shall pay to me her maidenhead ere they have it: Men shall hold of me *in capite*: and we charge and command that their wives be as free as heart can wish, or tongue can tell."[3]

This is a reference to the old custom of exacting what was known as maiden rent, from the tenant, by the lord, in lieu of the latter's privilege of spending the first night with the wife of the tenant.

Such rent, known to the old English law, as maiden rent, was in the nature of a fine, paid to the lord of the

---

But when it was sent up to the Lords, it was there strongly opposed, particularly by the clergy, who would not consent to any diminution of their ancient privileges; however, at last, it got through that house, and received the royal assent." And the next year there was a general law passed, taking clergy away from accessories before the fact in murder and other crimes. V Reeves' History Eng. Law, p. 158.

[1] 2' Henry VI, Act IV, Scene VII.

[2] Crabb's Eng. Law, 103-104; 3 Bl. Comm. 58.

[3] 2' Henry VI, Act IV, Scene VII.

manor, in consideration of the lord's relinquishment of his customary right of lying the first night with the bride of his tenant.[1]

Cade proclaims that he will enforce his right, as lord, to this barbarous custom, and makes a play upon the word *capite,* in connection with such custom.[2]

Sec. 300. Bail.—

"*York.* . . . The sons of York, thy betters in their birth,
Shall be their father's bail; and bane to those
That for my surety will refuse the boys."[3]

Bail, in practice, are those persons who become surety for the appearance of a defendant, in court, at his trial day.[4]

Bail was first introduced, in English law, to mitigate the hardship imposed upon offenders, while in the custody of the sheriff, under arrest, the security thus offered standing to the sheriff in the place of the body of the offender, until his day of trial.

Taking bail was made compulsory upon the sheriff by the statute 23 Hen. VI, c. 9,[5] and the privilege of the defendant was rendered more valuable by subsequent statutes.[6]

---

[1] Cowel; Bouvier's Law Dictionary.

[2] As *capite,* in Latin, means head, his meaning is clear that the subjects of the realm should hold by him, through the concession made by their wives, in accordance with this old custom, or, otherwise, they should lose their heads, i. e., maidenheads. III Reeve's History Eng. Law, 510.

[3] 2' Henry VI, Act V, Scene I.

[4] 1 Chitty, 286.

[5] See Statutes 23 Hen. VI, c. 9; III Reeve's Hist. Eng. Law, p. 481.

[6] See Statutes, 12 Geo. I, c. 29; 21 Geo. II, c. 3; 19 Geo. III, c. 70.

The Poet here makes York demand that his sons be accepted as his bail, as if he knew of the statutes giving him the right to demand bail, enacted in the reign of King Henry VI.

The Poet concludes that the dagger thrust into the pure breast of the loyal wife, Lucrece, "did bail it from the deep unrest Of that polluted prison where it breathed." (1725, 1726.)

In the LXXIV' Sonnet, the Poet thus discourses as to death:

"But be contended: when that fell arrest
Without all bail, shall carry me away,
My life hath in this line some interest,
Which for memorial still with thee shall stay." (1, 4.)

The Poet tells his friend, in the CXXXIII' Sonnet:

"Prison my heart in thy steel bosom's ward,
But then my friend's heart let my poor heart bail." (9, 10.)

CHAPTER XXIII.

"THIRD PART OF KING HENRY THE SIXTH."

Sec. 301. No inter-regnum, under English Law.
302. Title by confirmation.
303. Disinheriting heir.
304. Estate-tail, upon condition.
305. Acts of Parliament.
306. Lady Grey's suit for husband's lands.
307. Concubine.
308. Richard the Third, an embryonic criminal.
309. Richard's morbid vanity.
310. Crime the basis of Richard's character.
311. Elizabeth's plea of "Sanctuary."

Sec. 301. No inter-regnum, under English law.—

"*York.* He rose against him, being his sovereign,
And made him to resign his crown, perforce.
War. Suppose, my lords, he did it unconstrain'd,
Think you, 'twere prejudicial to his crown?
Exe. No; for he could not so resign his crown,
But that the next heir should succeed and reign."[1]

This dispute over the claims of York to the crown, is based upon the constitutional principal, in English law, that because of the interest of the public in the crown and the fact that the Government could not be destroyed, the king, as such, could not create a vacancy in the official head of the Government, but as the law put it "the king never dies." This principal, which prevented any inter-regnum,[2] or vacancy in the Government, along with the rights of the direct issue from the last lawful holder, known as the law of primogeniture, is the basis of York's claim to the crown. That the claim was legally stronger than that of the house of Lancaster, is clear to those

[1] 3' Henry VI, Act I, Scene I.
[2] 2 Bl. Comm. 191.

familiar with the English common law. The heir, to be entitled to take in that character, must have been the nearest male heir of the whole blood, to the person who was last actually seized. This rule has obtained from the earliest ages.[1] It is this seisin, which makes a person the *stirps,* or stock, from which all future inheritance, by right, is derived by right of blood. Hence, if the heir, on whom the inheritance has been cast, by descent, dies before he has acquired this seisin, his ancestor not himself, is the person last seized and other claimants must make themselves his heirs.[2] York, therefore, showing a direct descent from the last Plantagenet, Edward Third, made out a prima facie better title to the crown than Henry VI, as these lords decided.

Sec. 302. Title by confirmation.—

"*York.* Confirm the crown to me, and to mine heirs,
And thou shalt reign in quiet whilst thou liv'st.

---

[1] Bracton, lib. 2, fol. 69a; 2 Hale's Hist. Com. Law, pp. 94, 95, 98.

[2] Litt. sec. 8; Coke, Litt., 11b; 2 Bl. Comm. 209; Hale's Hist. Comm. Law, c. 11.

King Henry, in his dilemma, urged that Richard II had voluntarily given up the crown to Bolingbroke, or Henry IV, and Warwick raised the question, after York claimed that it was forced upon him, whether or not the rights of hereditary monarchy would be affected by his act, even if it had been voluntary, and Exeter replied that it could not affect the rights of the next heir to the crown, regardless of whether the ancestor had voluntarily or involuntarily attempted to give the crown to another. This was as the law would view it.

In recognition of this constitutional principle of English law, the young Prince, asks his father, in 3' Henry VI: "*Prince.* Father, you cannot disinherit me: If you be king, why should not I succeed?" (Act I, Scene I.)

Plowden shows how the death of the king causes the mere disunion of the king's natural body, from his body politic, and the kingdom is demised or transferred to his successor, so the royal dignity or office remains perpetual. Plowd. 117, 234.

K. Hen. I am content: Richard Plantagenet,
Enjoy the kingdom after my decease."[1]

A title by confirmation is a title derived by a conveyance or contract by which an estate that was otherwise voidable, or subject to dispute, is made firm and unavoidable.[2] To make a valid confirmation the confirmor, or the one who makes the confirmation, must be advised of his rights, and the title of the confirmee is not strengthened by the confirmation to the extent of making an otherwise void title good, although one merely voidable may be cured by confirmation, as it was a maxim of the common law, *qui confirmat nihil dat.*[3] However, as the title of York, to the crown, was not void, but only the subject of dispute and was, *prima facie* stronger, in law, than that of Henry VI, this confirmation would have been sufficient to defeat the house of Lancaster, if the crown had been the subject for such disposition by the king.

Sec. 303. Disinheriting heir.—

"*War.* Why should you sigh, my lord?
K. Hen. Not for myself, lord Warwick, but my son,
Whom I unnaturally shall disinherit."[4]

Disinheritance was the act, by which a person deprived his heir of an inheritance, that the heir, without such act, would have inherited.[5] At common law, in other matters than the crown—in which the public was concerned as well as the individual holding as king—anyone could give his estate to a stranger and thus disinherit his heir apparent.[6] The intent to disinherit an heir, however, at common law, must be clearly apparent from the language of

[1] 3' Henry VI, Act I, Scene I.
[2] 9 Coke, 142 a.
[3] Coke, Litt. 295; Toullier, De. Civ. Fr. l. 3, t. 3, c. 6n, 476.
[4] 3'Henry VI, Act I, Scene I.
[5] Cooper, Justin. 495.
[6] Taylor vs. Webb, Styl. 319.

the testator or last owner of property and if such intent was not clearly apparent, the heir would not be disinherited.[1]

Sec. 304. Estate-tail, upon condition.—

"*K. Hen.* . . . I here entail
The crown to thee, and to thine heirs forever;
Conditionally, that here thou take an oath,
To cease this civil war, and, whilst I live,
To honour me as thy king and sovereign;
And neither by treason nor hostility,
To seek to put me down and reign thyself."[2]

King Henry here attempts to entail the crown to York and his heirs,[3] conditionally,[4] such estate tail, to vest, on his death, if the condition subsequent, i. e., if the war is stopped, if he is honored as his sovereign, until his death, and he did not, by treason or hostility, seek to put him down and reign himself, during his life, but the Poet did not use the words necessary to create such an estate, for in the creation of an estate tail, words of limitation must be used, which indicate clearly what heirs are to take, the usual form of limitation being to one and the heirs of "his body."[5] In other words, the limitation by the King, lacked the very essential of an estate tail, which, instead

[1] Taylor vs. Webb, *supra;* Gardner vs. Sheldon, Vaugh. 262; Trent vs. Hanning, 7 East, 102, 103.

Queen Margaret tells the King: "*Q. Mar.* Thou would'st have left thy dearest heart-blood there, Rather than made that savage duke thine heir, And disinherited thine only son." (3' Henry VI, Act I, Scene I.)

Clifford tells the king, in 3' Henry VI: "*Cliff.* . . . Thou, being a king, bless'd with a goodly son, Didst yield consent to disinherit him, Which argued thee a most unloving father." (Act II, Scene II.)

[2] 3' Henry VI, Act I, Scene I.

[3] Tiedeman, R. P. (3d ed.), Sec. 38; Coke, Litt. 224a.

[4] Tiedeman, R. P. (3d ed.), Secs. 201, 203.

[5] Tiedeman, R. P. (3d ed.), Sec. 39 and citations; 2 Bl. Comm. 112-116.

of going to one's heirs generally—as here limited—go to the heirs of one's "body."[1] If the words, "seed," "issue" or "children" had been used, in connection with the word "heirs," the estate, if executed in proper form, would have conveyed a good estate tail—if the crown had been a proper subject for such conveyance—but in the form here given, the technical common law estate tail was not created.[2]

Sec. 305. Acts of Parliament.—

"*Edw.* . . . You—that are king, though he do wear the crown,—
Have caused him, by new act of parliament,
To blot out me, and put his own son in."[3]

Parliament is the legislative branch of the English Government, consisting of the king, house of lords and house of commons.[4] The king is usually called a part of parliament, because of his prerogative of veto and the necessity of his approval of the "acts" of parliament, to give them effect as laws. Since the power of veto has never been exercised since queen Anne's time, however, the authority of parliament is now practically unlimited.[5]

---

[1] Coke, Litt. 27; 2 Bl. Comm. 115.

[2] 2 Prest. Est. 480-485.

If Lord Bacon, or Lord Coke had been using words to create an estate tail no such failure to use the necessary common law words to create such an estate would have occurred.

The Poet also makes the Queen fail to note this distinction and she, likewise, in speaking of the estate tail, fails to use words equivalent to the words of limitation necessary at common law, in creating this character of estate.

Queen Margaret asks the King: "*Q. Mar.* To entail him and his heirs unto the crown, What is it, but to make thy sepulchre, And creep into it, far before thy time?" (3' Henry VI, Act I, Scene I.)

[3] 3' Henry VI, Act II, Scene II.

[4] 1 Bl. Comm. 147, 157; 2 Stephen's Comm. 537.

[5] May, Imperial Parliament.

Edward here charged Queen Margaret with wearing the crown of England and with having dominated the king to pass a law blotting out his title to the crown.

Sec. 306. Lady Grey's suit for husband's lands.—

"*K. Edw.* This lady's husband, Sir John Grey, was slain,
His lands then seiz'd on by the conqueror:
Her suit is now, to repossess those lands;
Which we, in justice, cannot well deny."[1]

The widow Grey's claim was in the nature of that enforced by the old common law writ, *Cui in vita,* which was a writ of entry that lay for a widow against a person who was in possession of her land by claim derived from her husband in his lifetime.[2] But the Poet presents her claim as derived from her husband, as it was "his lands" that the conqueror had confiscated, not hers. However, her suit, was to "reposses those lands" and Edward, whether impressed with the comeliness of the widow or the strength of her claim, was not inclined to resist her title to the lands.

Sec. 307. Concubine.—

"*L. Grey.* And that is more than I will yield unto.
I know, I am too mean to be your queen,
And yet too good to be your concubine."[3]

Lady Grey is made by the Poet, by these lines, to refuse to acquire her lands, at the expense of her chastity. A concubine, in the law, is a woman who cohabits with a man, as his wife, without being married.[4] Among the ancients, concubinage was a species of marriage, and was the only marriage which those who did not enjoy the *jus con nubii,* could contract. While recognized by law, as a natural marriage, by the ancients, the status gave no

[1] 3' Henry VI, Act III, Scene II.
[2] 6 Coke, 8, 9.
[3] 3' Henry VI, Act III, Scene II.
[4] 1 Bishop's Cr. Proc. 1106; 1 Brown's Civ. Law, 80.

lawful rights, such as those which resulted from the civil marriage and the law permitting such natural marriages was repealed by the constitution of the Emperor Leo, in the year 886.[1]

Sec. 308. Richard III' an embryonic criminal.—

"*Glo.* . . . love foreswore me in my mother's womb:
And, for I should not deal in her soft laws,
She did corrupt frail nature with some bribe,
To shrink mine arm up like a wither'd shrub;
To make an envious mountain on my back,
Where sits deformity to mock my body;
To shape my legs of an unequal size;
To disproportion me in every part,
Like to a chaos or an unlick'd bear-whelp,
That carries no impression like the dam.
And am I then a man to be belov'd?
O monstrous fault to harbor such a thought:
Then, since this earth affords no joy to me,
But to command, to check, to o'erbear such
As are of better person than myself,
I'll make my heaven—to dream upon the crown;
And, whiles I live, to account this world but hell,
Until my misshap'd trunk, that bears this head,
Be round impaled with a glorious crown."[2]

Shakespeare here lets Richard himself present his deformity as an explanation of his criminal aims in life. Can it be possible that Shakespeare understood and thus attempted to account for his criminality, because of the malformation of the man, when in an embryonic condition? The science of criminology teaches that this is one of the causes of criminals and the Poet in presenting this explanation of Richard's character, offered an explanation consistent therewith. Upon this subject August Goll observes: "Embryology teaches us that creatures may be born so deformed as to seem to possess no resemblance to human beings, while a more minute examination discloses them to be in possession of the identical organs which

[1] Code Justinian; Bouvier's Law Dictionary.
[2] 3' Henry VI, Act III, Scene II.

characterize normal men; but owing to some peculiar sickly conditions the cells have not been able to develop normally—some pressure displaced them, prevented their functions, and caused malformations to such a degree that a hideous monstrosity was the result which otherwise might have had a free and harmonious development."[1]

[1] Goll's Criminal Types, in Shakespeare, pp. 167, 168.

Elsewhere this author observes, of this character, as presented by the Poet: "It is the genesis of his evil courses that calls for examination; it is the psychological reason for the coming into life of such a monster, the spiritual understanding of the origin of the infinite darkness which shrouds his heart, a darkness which the human eye vainly tries to pierce so long as it has not succeeded in getting at the cause of the darkness itself—this is the point of importance in Richard III." *Idem.* p. 167.

Queen Margaret thus asks after Richard, in 3' Henry VI: "*Q. Mar.* . . . where is that devil's butcher, Hard-favor'd Richard? Richard, where art thou? Thou art not here: Murder is thy alms-deed; Petitioners for blood thou ne'er put'st back." (Act V, Scene V.)

King Henry, before his murder by Richard, in the Tower, thus upbraids him, for the murder of his son, the Prince:

"*K. Hen.* Thy mother felt more than a mother's pain,
And yet brought forth less than a mother's hope;
To-wit, an indigest deformed lump,
Not like the fruit of such a goodly tree.
Teeth had'st thou in thy head, when thou wast born,
To signify,—thou cam'st to bite the world:
And, if the rest be true, which I have heard," etc.

(3' Henry VI, Act V, Scene VI.)

And Richard himself, then soliloquizes, as follows:

"*Glo.* . . . I, that have neither pity, love nor fear,
Indeed, 'tis true, that Henry told me of;
For I have often heard my mother say,
I came into the world with my legs forward:
Had I not reason, think ye, to make haste,
And seek their ruin, that usurp'd our right?
The midwife wonder'd; and the women cried
O, Jesus bless us, he is born with teeth:
And so I was; which plainly signified—
That I should snarl and bite and play the dog."

(3' Henry VI, Act V, Scene VI.)

Sec. 309. Richard's morbid vanity.—

"*Glo.* . . . yet, I know not, how to get the crown,
For many lives stand between me and home;
And I,—like one lost in a thorny wood,
That rents the thorns and is rent with the thorns,
Seeking a way, and straying from the way;
Not knowing how to find the open air,
But toiling desperately to find it out,—
Torment myself to catch the English crown:
And from that torment I will free myself,
Or hew my way out, with a bloody axe."[1]

In seeking a cause for his criminal nature, as if the Poet understood the deep science of criminology, Shakespeare here presents the natural morbid vanity of the deformed person, as one of the reasons for the criminal inclinations of Richard III. Upon this phase of the subject the scientific criminologist observes: "Who does not know the morbid vanity from which deformed natures suffer? Their abnormal vanity continually occupies them with the thought of self, which is thereby pushed so unduly to the front that they are, as it were, hypnotized by it, and are blinded to the proper proportions of things. If their bodily defects make them exceptions, they will, also, be exceptional in winning great distinctions. They want to go far, to see others bend before them, then they may be reconciled to their misfortune. . . . They yearn after outward recognition, positions of honour, power and influence; they wish to hear themselves talked of, they wish to enjoy the incense of others, to receive marked demonstrations of regard."[2]

Sec. 310. Crime the basis of Richard's character.—

"*Glo.* . . . Why, I can smile, and murder while I smile;
And cry, content, to that which grieves my heart;
And wet my cheeks with artificial tears,

---

[1] 3' Henry VI, Act III, Scene II.

[2] Goll's Criminal Types in Shakespeare, pp. 193, 194.

And frame my face to all occasions.
I'll drown more sailors than the mermaid shall;
I'll slay more gazers than the basilisk;
I'll play the orator as well as nestor,
Deceive more slily than Ulysses could,
And, like a Sinon, take another Troy:
I can add colors to the chameleon;
Change shapes, with Proteus, for advantages,
And set the murd'rous Machiavel to school.
Can I do this, and cannot get a crown?
Tut: were it further off, I'll pluck it down."[1]

Commenting upon this criminal nature of the man, Richard, as portrayed by the Poet, the criminal expert, Goll said: "Richard III is the 'criminal by instinct' of the first water. Solely animated by his own personal ambition, thirst for power, and the crown, without a spark of altruistic motive, without a thought at his succession of realizing any high aims, he attains his object by cunning, lying, impudence, or hypocrisy, and, chiefest by a series of the blackest crimes. No act of his is the result of momentary moods, impetuous emotions; everything is the necessary consequence of cold, clear calculation."[2]

Sec. 311. Elizabeth's plea of sanctuary.—

"*Queen Elizab.* I'll hence forthwith unto the sanctuary,
To save at least the heir of Edward's right.
There shall I rest secure from force and fraud."[3]

---

[1] 3' Henry VI, Act III, Scene II.

[2] Goll's Criminal Types in Shakespeare, pp. 165, 166.

Speaking elsewhere of the splendid portrayal of the criminal by instinct which this character affords criminal science, Goll observes: ". . . in every case, he substitutes for the rights of all, his own rights; and in these 'own rights' he includes everything which his personal lusts and desires urge him to obtain. . . . this right is the fixed foundation of his mind; it shows its effect everywhere, at all times and in all directions, as soon as an impulse to action makes itself felt in him." *Idem.* p. 161.

[3] 3' Henry VI, Act IV, Scene IV.

During the period of the world's history when the law's redress of wrongs was so inadequate and the ambition and cupidity of the race so often imposed such hardships upon the nobility, it is little wonder that they established a place where they would be secure from such attacks as those which threatened the Queen, in this play. When the dangerous game for place and power had gone against one and the arbitrament of war had decided for an opponent who sought one's life and family, the privilege of sanctuary was one very dear to Englishmen and it alone, furnished an abode free from the "force and fraud" of the outer world.[1] The right of sanctuary dates from an early period in English history, for Alfred, Ethelred, and all subsequent Saxon kings, expressly recognized the right, by their laws, and in a state of society like that among the Anglo-Saxons, the immunity indulged to places of worship, was not only politic, but humane and necessary, as well. It prevented the shedding of blood and preserved the peace. Hence, we find, that from the earliest time, in England, places of public worship were held in such reverence that criminals flying thither were, during their stay, allowed protection from arrest, whatever their crime might be.[2] If the person was drawn violently from the place where he had embraced sanctuary, he could plead this in abatement of the prosecution, during the reign of Edward III,[3] but during the reign of Henry VIII, by statute, (27 Henry VIII, c. 19) the benefit of sanctuary was denied to all offenders guilty of high treason.[4]

---

[1] For description of the Sanctuary at Westminster, where Elizabeth fled, with her mother and three daughters, in 1470, which was destroyed in 1775, see Rolfe's 3' Henry VI, p. 215, notes.

[2] I Reeves's History Eng. Law, p. 198.

[3] III Reeve's History Eng. Law. p. 331.

[4] IV Reeve's History Eng. Law, p. 469.

In a recent article in Law Notes, (Vol. 14, p. 51, June, 1910) discussing the ancient privilege of Sanctuary, the author observes:

"That system was not always consistent or clear, but its main outlines were as follows: Sanctuaries were of two kinds—general, as all churches and churchyards; special, as St. Martin's le Grand and Westminster. No doubt these last had originally also a religious sanction. Such places were twice consecrate; Pope and King, the canon and the common law, united in their favor. They protected felons, but not those guilty of sacrilege or (some held) of treason. They were not properly for debtors, whose reception was nevertheless justified by an ingenious quibble. Imprisonment might endanger life, and therefore (so the learned argued) the runaway debtor must be received. A man took sanctuary thus:—Having stricken (let us say) his fellow, he fled to the cathedral and knocked (with how trembling a hand!) at the door of the galilee. Over the north porch were two chambers where watchers abode night and day. On the instant the door swung open, and had scarce closed behind the fugitive when the galilee bell proclaimed to the town that another life was safe from them that hunted. Then the prior assigned him a gown of black cloth marked on the left shoulder with the yellow cross of St. Cuthbert, and therewith a narrow space where he might lie secure of life, though ill at ease. So it was at Durham. At Westminster the sanctuary man bore the cross keys for a badge, and walked in doleful state before the abbot at procession times; and there were, no doubt, countless variations. A phrase of the time reveals how close the watch was now and again. Under Edward II it was complained that the sanctuary man might not remove so much as a step beyond the precincts, *causa superflui deponendi*, without being seized and haled to prison. He was fed and lodged in some rough sort for forty days, within which time he must confess his crime before the coroner at the churchyard gate, and so constitute himself the king's felon. Then he swore to abjure the realm. The coroner assigned him a port of embarkation (chosen by himself), whither he must hasten with bare head, carrying in his hand a cross, not departing, save in direst need, from the king's highway. He might tarry on the shore but a single ebb and flow of the tide, unless it were impossible to come by a ship, in which case he must wade up to his knees in the sea every day. He was protected for another forty days, when, if he could not find passage, he returned whence he came, to try his luck elsewhere."

. . . . . .

"On the whole the privilege was strictly respected. For instance, the king's justices were wont to hold session in St.

Martin's Gate. They sat on the very border. The accused were placed on the other side of the street; a channel ran between them and their judges, and if they once got across *that* they claimed sanctuary, and all proceedings against them were annulled. And one sees the reason why Perkin Warbeck took such care 'to squint one eye upon the crown and the other on the sanctuary' (as Bacon curiously phrases it); yet the great case of Becket is there to show that nothing was absolutely sacred in these violent years. Nor does it stand alone. In 1191, Jeffrey, Archbishop of York, and son of Henry II, was seized at the altar of St. Martin's Priory, Dover, and dragged, episcopal robes and all, through dirty streets to the castle; this, too, by order of William Longchamp, Bishop of Ely, and Papal legate. In 1378, Archbishop Sudbury complained in Parliament that one Robert Hawley had been slain at the high altar even while the priest was saying a mass. It was rumored indeed that one Thurstian, a knight, chasing a sanctuary man with drawn sword, was of a sudden stricken with grievous ailments. But this and other like stories did not deter the citizens of London (*circa* 1349) from assembling at supper time in a great crowd, and dragging forth a soldier who had escaped on the way from Newgate to Guildhall, where he was being taken for trial. In another case (*temp.* Henry VI), where a youth had taken sanctuary after having foully slain a kind mistress, the good women about St. Martin's broke in and dispatched him with their distaffs. Of those who took sanctuary to good purpose the most famous was Elizabeth, widow of Edward IV, who, in 1471, registered herself a sanctuary woman in Westminster, and there sat, in Sir Thomas More's phrase, 'alow in the rushes.' But you have read the tragic story in Shakespeare. And in a later age 'beastly Skelton' (as Pope will have him), from that same Westminster safely lampooned the mighty Wolsey, though for that he needs must live and die there."

"To catalogue the evils of the sanctuary system were to show lack of historical sympathy, nay, even of humor. The former days were not as these; it had its place with the shrine and the pilgrimage, the knight-errant, and the trial by ordeal in the strange economy of a vanished world. As the times grew modern its practical inconvenience was felt for the first time. Yet the occasion of the first assault on the privilege of sanctuary was one where the benefits were conspicuous, and the assailant had the worst of motives. It was the case just noted of Edward IV's widow; she had the young Duke of York as yet safe with her. Her enemies were at a loss for the moment, and Buckingham,

then the sworn ally of Richard of Gloucester, took occasion in the Privy Council to attack her place of refuge. 'There were two chief plague-spots in London,' he snarled: 'one at the elbows of the city (Westminster), the other in the very bowels thereof (St. Martin's le Grand). These places were the refuge of theeves, mirtherers, and malitious, heynous traytors! nay,' he added, 'men's wives ran hither with their husbands' plate, and say they dare not abide their husbands for beating,' with more to the same effect. Had not Elizabeth yielded, Westminster might have witnessed a violation as affecting as that of Canterbury."

CHAPTER XXIV.

"KING RICHARD THE THIRD."

Sec. 312. Richard's crimes prompted by his isolation
313. Law of God and man.
314. Acquittal of the accused.
315. Accessory before the fact.
316. Avouch.
317. Disputing with Lunatic.
318. Clothing villany with "holy writ."
319. Warrant no protection against murder.
320. Guilty conscience.
321. Reward.
322. Death without lawful conviction.
323. Divine Law against murder.
324. Benefit of "Sanctuary."
325. Moveables.
326. Bigamy.
327. Levitical Law against niece marrying uncle.
328. Richard the Third's inherited criminal instinct.
329. Demise.
330. Corrupted Justice.
331. Swords as Laws, under Richard's reign.

Sec. 312. Richard's crimes prompted by his isolation.—

"*Glo.* . . . I, that am rudely stamp'd, and want love's majesty,
To strut before a wanton ambling nymph;
I, that am curtail'd of this fair proportion,
Cheated of feature by dissembling nature,
Deform'd, unfinish'd, sent before my time,
Into this breathing world, scarce half made up,
And that so lamely and unfashionable,
That dogs bark at me, as I halt by them;—
Why I, in this weak piping time of peace,
Have no delight to pass away the time;
Unless to spy my shadow in the sun,
And descant on mine own deformity;
And therefore.—since I cannot prove a lover

To entertain these fair well-spoken days,—
I am determined to prove a villain,
And hate the idle pleasures of these days."[1]

In looking for the psychological reason for his very pronounced criminal appetite and the marked cruelty in his make-up, the criminologist can but look to the natural isolation which Richard's deformity forced upon him, as the genesis for his criminal course. This bodily defect must have been construed by the Poet as the reason for his criminality, for he again and again presents it, as the reason for his extreme sensitiveness. Such deformity would naturally lead to so many humiliations, in a proud sensitive nature, as to make of him a lonely, revengeful creature, with his hand raised against all the world.

Of this bodily defect, as a basis for his criminality, the criminal expert, Goll, in contemplating the character of Richard, observes: "One only feels duties, as such, to one's own community. The soldier feels no duties to the enemy, the European feels himself released from all duties of civilization, when he is called to action, among savage tribes. And to Richard everybody else is an enemy, a foreigner, with whom he has no connection, to whose race he does not belong. . . . Because he stands alone, every man's hand, has, from the first day, been lifted against him, therefore his hand, too, is lifted against every man, against all these hated, well-made people, who together form one community, opposed to him alone. He is at war with them all. And in war, war's deeds are done."[2]

---

[1] King Richard III, Act I, Scene I.

[2] Goll's Criminal Types in Shakespeare, pp. 197, 198.

In making love to Lady Anne, Richard taunts himself with his isolation: "I no friends to back my suit withal, But the plain devil and dissembling looks." (Act I, Scene II.)

Richard thus moralizes, after the determination to put his wife to death, in King Richard III: "*K. Rich.* . . . Uncertain way of gain: But I am in so far in blood, that sin will pluck

Sec. 312a. Ordeal of the bier.—

"*Lady Anne.* . . . O gentlemen, see, see! dead Henry's wounds
Open their congeal'd mouths and bleed afresh."[1]

When Gloster here is made to interrupt the funeral procession of Henry VI, Lady Anne, as if familiar with the old law of ordeal, known as the ordeal of the bier, exclaims to the bystanders that the guilty presence of the murderer has made the wounds of the deceased to open and cry out against him.

For centuries murderers were tried by ordeal, and the tests of the red-hot iron, for the patricians, and of the hot water, for the rustics and common people, were among the most reliable methods in use for determining their guilt or innocence. By the ordeal of the bier, here referred to, the suspected murderer was required to approach and touch the body of the murdered person, when it was supposed, if he was guilty, to bleed afresh, or to foam at the mouth, or give other evidences of the presence of the murderer.[2]

This proceeding, which obtained for centuries in the English law, was finally abolished in the year 1219, by the Council of Henry III, after which it was used again only in the trial of witches and sorcerers, because of the supposed absence of direct evidence against them.[3]

"The ordeal of the bier was exemplified in the current literature of the age of Richard Coeur-de-Lion, for the histories of that king report that when he met the funeral procession of his father, Henry II, at Fontev-

[1] Richard III, Act I, Scene II.

[2] Lea, "Superstition and Force" (3rd ed.), pp. 315, 323; White's "Legal Antiquities;" Pattetta, Ordalie; 1 Reeve's History English Law, 203; Herbert's Antiquities (1804), p. 146; Leges Athelstane; 1 Pollock & Maitland's History English Law, 152; II *Idem.*, 599, 650; Leg. Henrici, I, cap. lxv.

[3] II Pollock & Maitland's History English Law, pp. 599, 650.

raud, the blood spurted from the nose of the deceased, because of the treason and rebellion of which his son had been guilty.

"Shakespeare utilizes this story of Richard Coeur-de-Lion, in the funeral scene in Richard III.[4]

"The circumstances and conditions under which ordeal was employed, in the trial of the various felonies known to the early Saxon laws, varies, necessarily, with the customs and legislation of the different rulers, and sometimes we find that the right of selection obtained, between this and other modes of compurgation, or between the different forms of ordeal."[5]

---

[4] White's "Legal Antiquities," p. 166.

[5] *Ante idem.*, 168; II Comti, polc. cap. xxx, xii; L. Henrici, I. cap. ixv, sec. 3.

"In Sir Walter Scott's 'Minstrelsy of the Scottish Border' we also find reference to this ordeal of the bier, when, in the ballad of Earl Richard, this author established the innocence of the maid, by this test:

'Put na the wite on me,' she said;
'It was my may Katherine.'
Then they hae cut baith fern and thorn,
To burn that maiden in.
It wadna take upon her cheik,
Nor yet upon her chin;
Nor yet upon her yellow hair,
To cleanse that deadly sin.
The maiden touched that clay-cauld corpse,
A drap it never bled;
The ladye laid her hand on him,
And soon the ground was red."

And thus Scott uses the ordeal of the bier to establish that the accuser was herself the guilty person, and the Bard of Avon and the Elder Edda utilize this ordeal and that of the boiling water, to demonstrate the infallibility of this Divine Test, when applied, to ascertain the guilt or innocence of one accused of such crimes as may legitimately be the subject of this character of proceeding, known to the ancient law as one of the Judgments of God." White's "Legal Antiquities," pp. 166, 167.

Sec. 313. Law of God and man.—

"*Anne.* Villain, thou know'st no law of God 'nor man;
No beast so fierce, but knows some touch of pity."[1]

Anne here declares that Richard is devoid of the first element of citizenship, being without fear of the law of either God or man. One without fear of the law of man alone, is a criminal, for criminality consists of following one's inclinations, regardless of the law, which protects the rights of others. If, added to this, one is also regardless of the obligations of the Divine law, and recognizes no adherence thereto, he is, if possible, below the beasts, for, as the Poet has Anne say: "No beast so fierce but knows some touch of pity."[2]

---

on sin. Tear-falling pity dwells not in this eye." (Act IV, Scene II.)

Referring to Richard III, Queen Margaret tells the Duchess of York, in King Richard III: "*Q. Mar.* Richard yet lives, hell's black intelligencer; Only reserv'd their factor to buy souls, and send them thither." (Act IV, Scene IV.)

Contemplating his own character, before the battle with Richmond, King Richard III thus concludes as to himself:

"*K. Rich.* I shall despair.—There is no creature loves me;
And, if I die, no soul shall pity me:—
Nay, wherefore should they; since that I myself
Find in myself no pity to myself.
Methought the souls of all that I had murder'd
Came to my tent: and every one did threat
To-morrow's vengeance on the head of Richard."
(Act V, Scene III.)

[1] King Richard III, Act I, Scene II.

[2] God was supposed, in the olden times, to lend assistance to the innocent and a prisoner was asked, before being put upon his trial, whether he would go to trial by ordeal, or by jury, i. e., by *God or his country.* If the former, he had the trial by battle, in which God was supposed to help the innocent, but if the latter, he was tried by a jury. 1 Chitty, Cr. Law, 416.

Sec. 314. Acquittal of the accused.—

"*Glo.* . . . Vouchsafe, divine perfection of a woman,
Of these supposed evils, to give me leave,
By circumstance, but to acquit myself."[1]

Richard here asks of Anne the privilege of establishing his innocence of the charges she has brought against him. In criminal practice, acquittal is the absolution of a person charged with a crime or misdemeanor.[2] Acquittals are either by introduction of the facts, after a trial, or by law, because of the application of the law to the facts as shown to exist. The acquittal here invoked, is, of course, because of the facts as Richard claims them to exist.

Sec. 315. Accessory before the fact.—

"*Glo.* . . . Is not the causer of the timeless deaths,
Of these Plantagenets, Henry and Edward,
As blameful as the executioner?"[3]

Richard here puts the question as to whether or not the accessory before the fact, to these several murders, is not equally guilty, with the persons who carry out the murders as planned. An accessory in the perpetration of a crime, is one who, although not the chief actor therein, is in some way concerned in the crime, either before or after the crime is committed. An accessory before the fact, is one who, though absent when it was committed, yet procured, counselled or commanded its commission.[4] An accessory after the fact, is one who, knowing a crime to be committed, receives, relieves, comforts or assists the felon.[5] Richard insists that the accessory before the fact is just as guilty as the executioner and attempts to thus shift the guilt from his own guilty shoulders to those of his brother.

---

[1] King Richard III, Act I, Scene II.
[2] Coke, 2' Inst., 364.
[3] King Richard III, Act I, Scene II.
[4] 1 Hale, Cr. Pl. 615.
[5] 4 Bl. Comm. 37.

Sec. 316. Avouch.—

"*Glo.* . . . I will avouch, in presence of the king:
I dare adventure to be sent to the Tower."[1]

To avouch is to assert publicly, or deliberately, a matter of fact, without equivocation, or vacilation, either by written declaration or by word of mouth, so that the fact thus asserted may be used as evidence of its existence.[2] Richard here asserts his willingness to make public statement of the facts asserted, even if it results in his being arrested and sent to the Tower.

Gloster tells Anne, in King Richard III: "*Glo.* . . . This hand, which, for thy love, did kill thy love, Shall, for thy love, kill a far truer love; To both their deaths shalt thou be accessary." (Act I, Scene II.)

Explaining to her wronged lord, how her chastity was forced, the noble Lucrece narrated:

"Immaculate and spotless is my mind;
That was not forced; that never was inclined
To accessary yieldings, but still pure
Doth in her poison'd closet yet endure." (1656, 1660.)

[1] King Richard III, Act I, Scene III.

[2] Bouvier's Law Dictionary. In Deutoronomy occurs the following: "Thou hast avouched the Lord this day to be thy God." Deut. 26, 17.

Speaking of his contemplated charges against Cardinal Wolsey, Buckingham said, in King Henry VIII: "*Buck.* To the king I'll say't; and make my vouch as strong, as shore of rock." (Act I, Scene I.)

Horatio is made to say, in Hamlet: "*Hor.* Before my God, I might not this believe, Without the sensible and true avouch, Of mine own eyes." (Act I, Scene I.)

Brabantio charged Othello with seduction of his daughter, before the Duke, in the following lines:

"*Bra.* I therefore vouch again,
That with some mixtures powerful o'er the blood,
Or with some dram conjur'd to this effect,
He wrought upon her." (Act I, Scene III.)

Othello tells the Senators, in regard to Desdemona accompanying him to the wars: "Vouch with me, heaven; I therefore beg it not, To please the palate of my appetite." (Act I, Scene III.)

Sec. 317. Disputing with lunatic.—

"*Dor.* Dispute not with her, she is lunatic."[1]

A lunatic, in law, is one who is without the power of reasoning which is possessed by individuals in health.[2] A lunatic was said to be *non compos mentis,* not of sound mind, or understanding, and for this reason the person so found was not responsible, in law, for his or her acts.[3]

Of course not having any understanding or reasoning powers, a lunatic would be incapable of reasoning or dispute, in an intelligent manner, so this is why all further dispute is discouraged, in this instance.

Sec. 318. Clothing villainy with holy writ.—

"*Glo.* . . . And thus I clothe my naked villainy
With old odd ends, stol'n forth of holy writ;
And seem a saint, when most I play the devil."[4]

This verse is frequently quoted by lawyers, to meet the conditions in lawsuits, when an attorney or a party to the cause assumes a holy attitude as a cloak for some piece of villainy. The Poet seemed to possess a natural dislike for hypocrisy and never hesitated to express, in no unmeasured terms, his contempt for those who assumed a fair seeming outside, for the purpose of winning favor, or by feigning to be better than they really were. A false pretender to virtue and piety, or one who assumes such virtues when he has them not, is, indeed, an object of contempt, to all alike, so in presenting this side of human nature, the Poet but performs his object, of expressing the universal truth in human nature, as he sees it.

[1] King Richard III, Act I, Scene III.

[2] Coke, Litt. 247.

[3] 4 Coke, 124.

Lord Stanley advises Queen Elizabeth, in King Richard III: "*Stan.* . . . Bear with her weakness, which, I think, proceeds, From wayward sickness, and no grounded malice." (Act I, Scene III.)

[4] King Richard III, Act I, Scene III.

Sec. 319. Warrant no protection against murder.—

"1 *Murd.* What: art thou afraid?

2 *Murd.* Not to kill him, having a warrant for it; but to be damn'd for killing him, from the which no warrant can defend me."[1]

The murderer here replies that he is not afraid of the law of man, for being armed with his warrant for the death of the prisoner, he is legally entitled to protection for his act. This, of course, is true, as matter of law.[2] But a willful murder is never justified because of the possession of a warrant by the officer doing the killing.[3] It is not so much the law of man, as it is the law of God, that the murderer fears, in this instance, however, for he is not without some religious scruples and knows the warrant can furnish him no protection for the violation of the Divine law against murder.[4]

Sec. 320. Guilty conscience.—

"1 *Murd.* So when he opens his purse to give us our reward, thy conscience flies out.

. . . . . .

2 *Murd.* I'll not meddle with it, it is a dangerous thing, it makes a man a coward; a man cannot steal, but it accuseth him; a man cannot swear but it checks him; a man cannot lie with his neighbor's wife,

---

[1] King Richard III, Act I, Scene IV.

[2] 1 Bishop's Cr. Proc. 187-193.

[3] 1 Bishop's Cr. Proc. 206-218.

[4] Exodus, XX, 13.

A capital sentence, in England, has always been carried into effect by warrant. 1 Bishop's New Cr. Proc., Sec. 1336.

Before commission of the murder, when they go to Gloster, for the warrant, the first murderer said: "We are my lord; and come to have the warrant." And he tells them: "*Glo.* . . . I have it here about me." (Act I, Scene III.)

Menenius tells the tribunes of the people, in Coriolanus, on their condemning Coriolanus, untried: "*Men.* Do not cry havoc, where you should but hunt, with modest warrant." (Act III, Scene I.)

but it detects him: 'Tis a blushing, shame-faced spirit, that mutinies in a man's bosom; it fills one full of obstacles."[1]

Conscience, in the law, is that faculty which leads us to decide as to our actions, condemning that which is wrong and commending the right. In other words, it is self-knowledge, or the principle which enables us to determine between right and wrong. The law, being based upon reason, pays the greatest deference to the individual conscience, so that what is known as the conscience clause of criminal laws, exempts those who have conscientious scruples against the death penalty, from jury service.[2] Courts of equity are said to be "courts of conscience," and those who act in obedience to the dictates of reason or conscience, are protected in the law. The murderer, before commission of the crime, acts in violation of such dictates and is entitled to no law for such an act, because the law runs with and not against the conscience.

The above lines and others wherein the Poet presents the promptings of the conscience to the criminal, are frequently quoted in lawyers' work.

---

[1] King Richard III, Act I, Scene IV.

[2] 2 Kent's Comm. 13, *et sub.*

Before the sleeping Clarence awakes, the 2d murderer said: "'Faith, some certain dregs of conscience are yet within me." (King Richard III, Act I, Scene IV.)

Queen Margaret tells Richard, in King Richard III: "*Q. Mar.* . . . . The worm of conscience still begnaw thy soul." (Act I, Scene III.)

Speaking of the tyrant, Richard, Oxford is made to say, in King Richard III:

"*Oxf.* Every man's conscience is a thousand swords.
To fight against that bloody homicide." (Act V, Scene II.)

Speaking, after awakening from his dream, before the battle with Richmond, Richard III said: "*K. Rich.* My conscience hath a thousand several tongues, And every tongue brings in a several tale, And every tale condemns me for a villain." (Act V, Scene III.)

In bidding farewell to his friends, before his execution, Buckingham tells them, in King Henry VIII: "*Buck.* . . . And, if I have a conscience, let it sink me, Even as the axe falls, if I be not faithful." (Act II, Scene I.)

The duke of Suffolk, talking with the lord Chamberlain, as to the contemplated divorce of the king and his attraction for Anne Boleyn, said:

"*Cham.* It seems, the marriage with his brother's wife, has crept too near his conscience.

Suff. No, his conscience has crept too near another lady." (Act II, Scene II.)

Urging his conscience as a reason to excuse his infatuation for Anne Boleyn, King Henry VIII said: "Would it not grieve an able man to leave so sweet a bed fellow? But, conscience, conscience, O, 'tis a tender place, and I must leave her." (Act II, Scene II.)

Speaking with Cardinal Wolsey, as to his contemplated divorce suit, King Henry VIII said: "*K. Hen.* O my Wolsey, The quiet of my wounded conscience; Thou art a cure fit for a king." (Act II, Scene II.)

And again, the King said: "*K. Hen.* This respite shook the bosom of my conscience, enter'd me, yea, with a splitting power, and made to tremble the region of my breast."

. . . . . .

"Thus hulling in the wild sea of my conscience, I did steer toward this remedy, whereupon we are now present here together; that's to say, I meant to rectify my conscience." (Act II, Scene IV.)

After his fall Cardinal Wolsey said, in regard to the charges against him: "*Wol.* I feel within me, a peace above all earthly dignities, a still and quiet conscience." (Act III, Scene II.)

And speaking of Lord Chancellor More, chosen in his place, he said: "May he continue long in his highness' favor, and do justice for truth's sake, and his conscience." (*Idem.*)

Speaking of the beauty of Anne Boleyn, in King Henry VIII, a gentleman (?) said: "Our king has all the Indies in his arms, And more, and richer, when he strains that lady: I cannot blame his conscience." (Act IV, Scene I.)

Cranmer tells his peers, in the Council Chamber, in King Henry VIII: "*Cran.* . . . That I shall clear myself, Lay all the weight ye can upon my patience, I make as little doubt, as you do conscience in doing daily wrongs." (Act V, Scene II.)

Sec. 321. Reward.—

"'1' *Murd.* Remember our reward, when the deed's done,
2' *Murd.* Zounds, he dies; I had forgot the reward.'"[1]

A reward is an offer of recompense, given by authority of law, for the performance of some act for the public good, which is to be paid when the act is performed.[2] A reward may be either offered by the Government, or by a private person and, of course, in this instance it was the latter case.

The reward was recognized, at common law, as such a potent factor in its effect upon the one desirous of the reward, that informers, entitled to reward, were not competent witnesses, in actions wherein the conviction or acquittal of a person, being tried, depended on the evidence of such informer.[3]

Aaron, the Moor, said to Lucius, in Titus Andronicus:
"*Aar.* I know thou art religious,
And hast a thing within thee, called conscience."
(Act V, Scene I.)

Contemplating the effect of his play, upon his Uncle, Hamlet said: "*Ham.* . . . The play's the thing, Wherein I'll catch the conscience of the king." (Act II, Scene II.)

And after discoursing upon the uncertainties of that something after death which "must give us pause," Hamlet concludes: "Thus conscience does make cowards of us all; And thus the native hue of resolution, Is sicklied o'er with the pale cast of thought." (Act III, Scene I.)

[1] King Richard III, Act I, Scene IV.
[2] 4 Bl. Comm. 294.
[3] 1 Phillipps, Evid., 92, 99.

Speaking of Buckingham's arrest, King Richard asks, in Richard III:
"*K. Rich.* Hath any well-advis'd friend proclaim'd
Reward to him that brings the traitor in?"
(Act IV, Scene IV.)

Sec. 322. Death without lawful conviction.—

"*Clar.* . . . Before I be convict by course of law,
To threaten me with death, is most unlawful."[1]

To take away or deprive anyone of any right, except by course of law, is most unlawful, but of all the rights of the citizen, the right of personal security is the greatest and hence, to take one's life, except by "course of law," is the greatest injustice that can be offered one. A conviction, in practice, is the legal proceeding, by record, by which the guilt of a person accused of crime, is legally ascertained and upon which the sentence or judgment is founded.[2] It is necessary that a lawful conviction precede a judgment or sentence and of course, to go clandestinely to a prison and take one, a prisoner, without trial, or lawful conviction and take his life, is the rankest injustice, as Clarence contended with his murderers.

Sec. 323. Divine law against murder.—

"*Clar.* Erroneous vassal: the great King of kings
Hath in the table of his law commanded,
That thou shalt do no murder; Wilt thou then
Spurn at his edict, and fulfill a man's?
Take heed, for he holds vengeance in his hand,
To hurl upon their heads that break his law."[3]

When the murderers told Clarence that they were to kill him, in accordance with the order of the King, he confronts them with the ten commandments and especially the commandment against murder,[4] and this law or edict he cites as the law of "the great King of kings." As compared to the mere order of the king, the law of

[1] King Richard III, Act I, Scene IV.
[2] 1 Bishop's Cr. Law, 223.
[3] King Richard III, Act I, Scene IV.
[4] Exodus, 20, 13.

The murderer asks Clarence: "1 *Murd.* How can'st thou urge God's dreadful law to us, When thou hast broke it in such dear degree?" (Act I, Scene IV.)

the Lord, given to Moses on Mount Sinai, is invoked by Clarence, with the plea that if this Divine law is violated, the murderers had best take heed, for the vengeance of the Lord will be hurled upon their heads that break his law.

Sec. 324. Benefit of sanctuary.—

"*Buck.* . . . You break not sanctuary in siezing him.
The benefit thereof is always granted
To those whose dealings have deserv'd the place,
And those who have the wit to claim the place:
This prince hath neither claimed it, nor deserv'd it:
And therefore, in mine opinion, cannot have it:
Then, taking him from thence that is not there,
You break no privilege nor charter there.
Oft have I heard of sanctuary men;
But sanctuary children, ne'er till now."[1]

The right of sanctuary is here referred to and Buckingham contends that the privilege or benefit of sanctuary does not extend to children, but only to adults who have the wit to claim the privilege. Of course this is a narrow construction of the law. The right of sanctuary, at common law, was the right to claim exemption from service of criminal or civil process while the person against whom such process was addressed, was the inmate of a religious house, or sanctuary. Complete immunity to the civil law was afforded by this privilege.[2] Religious sanctuaries were quite common, in Europe, at an early day and they afforded complete protection to all persons from arrest, whether accused of crime, or pursued for debt.[3]

But it was always essential to plead the right of sanctuary and if a criminal who had resorted to a sanctuary, neglected to claim the exemption from the civil laws, he

[1] King Richard III, Act III, Scene I.

[2] Bouvier's Law Dictionary.

[3] Under the Anglo-Saxons, the immunity indulged to places of worship was both humane and politic, for it avoided the shedding of blood. I Reeve's History Eng. Law, p. 198.

was held to have waived the benefit of sanctuary, so to this extent the claim of Buckingham was correct, as presented by the Poet.[1]

Sec. 325. Movables.—

"*Glo.* . . . And, look, when I am king, claim thou of me
The earldom of Hereford, and all the movables
Whereof the king, my brother, was possess'd."[2]

Richard here promises Buckingham all the personal property and chattels of which the King died possess'd, as movables, in law, are those things which attend the person of the owner, in contradistinction to those things which are immovable, or fixed.[3] This is peculiarly a law term and is rarely used by others than lawyers, because of its technical meaning.

---

[1] III Reeve's History Eng. Law, p. 331; IV Reeve's History Eng. Law, p. 253; Bro. Sanct. 11. By 26 Henry VIII, c. 13, the privilege of sanctuary was denied to those guilty of high treason, and by other statutes during this reign, those claiming sanctuary were subjected to certainly limitations and required, while enjoying the privilege, to wear certain insignia, or badges to distinguish them. IV Reeve's Hist. Eng. Law, p. 469.

Cardinal Wolsey, after his disgrace, sought the benefit of sanctuary, at the Abbey of Leicester, in King Henry VIII, as follows: "*Grif.* . . . O father Abbot, an old man, broken with the storms of state, Is come to lay his weary bones among ye; give him a little earth for charity." (Act IV, Scene I.)

Aufidius is made to say in Coriolanus:
"*Auf.* . . . nor sleep, nor sanctuary, being naked, sick: nor fane, nor Capitol
The prayers of priests, nor times of sacrifice,
Embarquements all of fury, shall lift up
Their rotten privilege and custom 'gainst
My hate to Marcius." (Act I, Scene IX.)

[2] King Richard III, Act III, Scene I.

[3] 2 Bl. Comm. 384; 2 Stephen's Comm. 67; Tiedeman, R. P. (3d ed.), Sec. 1.

Sec. 326. Bigamy.—

"*Buck.* . . . A beauty-waning and distressed widow,
Even in the afternoon of her best days,
Made prize and purchase of his wanton eye,
Seduc'd the pitch and height of all his thoughts
To base declension and loath'd bigamy."[1]

Because of the former contract, by King Edward, to marry the Lady Lucy, Buckingham here urges that he was, at law, her lawful husband and hence his later marriage with Lady Gray, was illegal, since he was the husband of a living wife already. This conclusion, of course, is far fetched, but it was used for the purpose.

Bigamy is the willful contracting of a second marriage, when the contracting party knows that the first is still subsisting.[2] The construction adopted by Buckingham, in this verse, is rather that of the canonists, who treated it as bigamy to have once married a widow.[3]

Sec. 327. Levitical law against niece marrying uncle.—

"*K. Rich.* Tell her, the king, that may command, entreats.
Q. Eliz. That at her hands, which the king's King forbids."[4]

Later, in the same play, Buckingham, in vain, urges his claim to "The earldom of Hereford and the movables," which had been promised him. (King Richard III, Act IV, Scene II.)

[1] King Richard III, Act III, Scene VII.

[2] 1 Russell, Crimes, 187; 2 Kent's Comm. 69.

[3] 6 Bacon's Abr., 454, 500.

For effect, in the spiritual court, of the espousal agreement made by Edward, with Lady Lucy, see 6 Bacon's Abr., p. 461.

Urging the illegality of King Edward's marriage to Elizabeth Grey, because of the pre-contract of marriage by the King to Lady Lucy, Buckingham contends, in King Richard III: "*Buck.* You say, that Edward is your brother's son; So say we too, but not by Edward's wife: For first, he was contract to Lady Lucy." (Act III, Scene VII.)

[4] King Richard III, Act IV, Scene IV.

In this attempt to induce the mother to deliver her daughter into the hands of the murderer of her sons, Richard calculates, without reckoning with the mother instinct. After violating every sacred thing on earth, the Poet hurls back, the proffed advantage offered the mother, for her daughter's preferment in marriage with the murderer. Other relations could be violated, with impunity. Not the eternal source of humanity. Richard's dialectics were puerile against this shield of nature.

The mother points him to the Levitical law, "Thou shalt not uncover the nakedness of thy father's brother,"[1] as a Divine impediment which would forbid her daughter from contracting such an illegal marriage, for this, as she tells him, "the king's King forbids."

Sec. 328. Richard III' inherited criminal instinct.—

"*Duch.* . . . Thou cam'st on earth to make the earth my hell.
A grievous burden was thy birth to me;
Tetchy and wayward was thy infancy;
Thy school-days, frightful, desperate, wild and furious;
Thy prime of manhood, daring, bold, and venturous;
Thy age confirm'd, proud, subtle, sly and bloody,
More mild, but yet more harmful, kind in hatred:

[1] Leviticus, Ch. XVIII, 14.

For construction and application of this spiritual law, in both the civil and ecclesiastic courts, in Europe, see 6 Bacon's Abr., pp. 454, 500.

Replying to King Richard's suit, for her daughter's hand, Queen Elizabeth asks him:

"*Q. Eliz.* What were I best to say? her father's brother
Would be her lord? Or shall I say, her uncle?
Or, he that slew her brothers and her uncles?
Under what title shall I woo for thee?
That God, the law, my honour, and her love,
Can make seem pleasing to her tender years?"
(Act IV, Scene IV.)

What comfortable hour can'st thou name,
That ever grac'd me in thy company?"[1]

From these lines it is apparent that the Poet, in his representation of the character of Richard, bases his criminal instincts upon what, in modern times, would be known to the law as inherited neurosis. Tracing his inherited criminal instinct, the criminologist has said: "His grandfather is executed by Henry V, for villainous treachery to his king, hired by French money for the act, yet with the secret intention of placing one of his own blood on the throne. Richard's father spent his whole life in agitating and plotting to get his presumed right to the throne recognized in which he finally succeeded, until he was killed in the battle of Sandal after having been taken prisoner by Henry VI, Queen Margaret and Clifford. That such a mind, restless, intriguing, and greedy after power, might be inherited by the son, Richard, and in him appear in a more marked degree, is, according to the law of heredity, quite a near possibility, and may at least explain a certain inclination to crime in him."[2]

---

[1] King Richard III, Act IV, Scene IV.

[2] Goll's Criminal Types in Shakespeare, pp. 168, 169.

Queen Margaret refers to Richard's natural criminality, as follows, in King Richard III: "*Q. Mar.* . . . Thou that wast seal'd in thy nativity, The slave of nature and the son of hell." (Act I, Scene III.)

The Duchess of York thus bewails the birth of her son, Richard, in King Richard III:

"*Duch.* . . . O my accursed womb, the bed of death;
A cockatrice hast thou hatch'd to the world,
Whose unavoided eye is murderous." (Act IV, Scene I.)

Queen Margaret taunts the Duchess of York, with having given birth to such a criminal as Richard III, as follows:

"*Q. Mar.* . . . From forth the kennel of thy womb hath crept,
A hell-hound, that doth hunt us all to death:
That dog, that had his teeth before his eyes,
To worry lambs, and lap their gentle blood;
That foul defacer of God's handiwork;

Sec. 329. Demise.

"*Q. Eliz.* . . . Tell me what state, what dignity, what honour,
Canst thou demise to any child of mine?"[1]

The Queen here asks to know what conveyance or grant Richard can make to any of her children, which will materially assist them. A demise, at law, is a posthumous grant, either in fee, for life, or for years.[2] Unless, upon his dissolution, her child would be benefited, there is apparently no reason for the union asked for.

Sec. 330. Corrupted justice.—

"*Buck.* . . . Vaughan and all that have miscarried
By underhand corrupted foul injustice,
. . . . . .
Even for revenge mock my destruction."[3]

After having assisted Richard to rise to the kingdom by the crimes that made it possible for him to possess the crown, and after he had assisted him to corrupt the fountains of justice and trample under foot the rights of others, it is a just retribution that brings Buckingham to a realization of what it is to prosper by "underhand corrupted foul injustice." It is no longer the rights of

---

That excellent grand tyrant of the earth,
That reigns in galled eyes of weeping souls,
Thy womb let loose, to chase us to our graves."
(Act IV, Scene IV.)

The Duchess of York, tells Richard III, as he goes to war:
"*Duch.* Either thou wilt die, by God's just ordinance,
Ere from this war thou turn a conqueror,
Or I with grief and extreme age shall perish,
And never look upon thy face again." (Act IV, Scene IV.)

[1] King Richard III, Act IV, Scene IV.

[2] 2 Bouvier's Inst., 1774, *et seq.*

Of course the Queen here, does not concede that Richard is the lawful king, but treats his reign as a usurpation of the right to the crown, hence he could not transmit such right, on his death.

[3] King Richard III, Act V, Scene I.

others that he sees denied them, but it is now his very own that is threatened; his own life is in the way of the tyrant who has concluded to murder him, rather than comply with his promise to give him the lands and movables of the earl of Hereford, for his assistance in the criminal elevation he had risen to. Buckingham cannot now seek justice, after denying it to others and must suffer loss of his own life by the same foul "corrupted injustice" he had dealt out to others.[1]

Sec. 331. Swords as laws.—Under Richard's reign.—

"*K. Rich.* . . . Conscience is but a word that cowards use,
Devis'd at first to keep the strong in awe;
Our strong arms be our conscience, swords our law."[2]

In keeping with the whole course of Richard's career, and the criminal instinct, which has as a basis, the disregard of law and others rights, the Poet here sums up the whole total of Richard's character. He had, from the first, known no law, but his own ambition and greed; the rights of others were to him, but as an obstacle to be overcome, when in the way of gratification of his own ambition; devoid of conscience, he used the strong arm of the kingdom, to further his own self-interests and knew no law, but that of the sword. A fitting close, is this summing up of the character of this kingly outlaw, who decried the law and the rights of his fellows; ridiculed conscience, and in lieu thereof, advocated nought but "strong arms" and "swords" for "our law."

---

[1] An act is said to be corruptly done, when it is done with the intent to give some advantage inconsistent with official duty or the lawful rights of others. Bouvier's Law Dictionary.

Replying to the entreaties of the Cardinals to place her cause in the King's hands, Queen Katherine said: "*Q. Kath.* . . . Heaven is above all yet; there sits a Judge, that no king can corrupt." (Henry VIII, Act III, Scene I.)

[2] King Richard III, Act V, Scene III.

CHAPTER XXV.

"KING HENRY THE EIGHTH."

Sec. 332. Privity.
333. Wasting manors in military preparations.
334. Buckingham's trial for treason.
335. "Come into Court."
336. Pleading cause.
337. Session of Court.
338. Challenging prejudiced Judge.
339. Retainers.
340. Appearance in Court.
341. Under "hand and seal."
342. Motion to dismiss appeal.
343. Dilatory pleas.
344. Adjournment of Court.
345. Trial at Law.
346. Inventory.
347. Commission for office.
348. Writ of Praemunire.
349. Decree of divorce from Katherine.
350. Simony.
351. Purging one's self of guilt.
352. Verdict based on perjury.
353. Accusing one, "face to face."
354. Accusing Counselor.
355. Acting as both Judge and Juror.
356. Crime of heresy.
357. Appeal by King's ring.

Sec. 332. Privity.—

"*Buck.* Why the devil,
Upon this French going-out, took he upon him,
Without the privity o' the king, to appoint
Who should attend on him?"[1]

Privity, in the law, is the mutual or successive relationship to the same rights of property.[2] There is privity of

[1] King Henry VIII, Act I, Scene I.

[2] Bouvier's Law Dictionary.

contract, which is the relation existing between two contracting parties,[1] and the privity of estate, which is the relationship existing between those being interested in the same lands, as landlord and tenant.[2]

Buckingham uses the word in the popular, rather than the legal meaning, of consent or concurrence, meaning to say that the Cardinal, in this instance, had acted without the concurrence or consent of the King.

Sec. 333. Wasting manors in military preparations.—

"*Buck.* O, many
Have broke their backs with laying manors on 'em
For this great journey. What did this vanity
But minister communication of
A most poor issue."[3]

The subject of discussion here is the unprofitable result of the recent war with France and Abergavenny observes that he had kinsmen

". . . three at least, that have
By this so sicken'd their estates that never
They shall abound as formerly."

Buckingham replies, with a play on the legal term "manor," meaning that many of the English lords had assumed such military authority and preparations as to squander their estates, or waste their manors in the war with France.

A manor, in English law, is a freehold estate, held by the lord of the manor, who is entitled by immemorial custom, to maintain a tenure between himself and the copyhold tenants, whereby a feudal relation is maintained

[1] Viner, Abr.; Lawson, Contracts (2d ed.), 276, 305.

[2] Tiedeman, R. P. (3d ed.), secs. 138, 157.

The Friar, in describing the causes of the death of Juliet and Romeo, said: "All this I know, and to the marriage, Her nurse is privy." (Act V, Scene III.)

[3] King Henry VIII, Act I, Scene I.

between them.[1] But as sub-infeudation was abolished, in England, by the statute *qui emptores,*[2] and no manor could arise by operation of law, since that date, it follows that all existing manors must trace their existence to a time preceding the enactment of this statute.[3]

Sec. 334. Buckingham's trial for treason.—

"1 *Gent.* . . . The great duke
Came to the bar; where, to his accusations,
He pleaded still not guilty, and alleg'd
Many sharp reasons to defeat the law.
The king's attorney, on the contrary,
Urg'd on the examinations, proofs, confessions
Of divers witnesses; which the duke desir'd
To him brought, *viva voce,* to his face:
At which appear'd against him, his surveyor;
Sir Gilbert Peck, his chancellor; and John Court
Confessor to him; with that devil monk,
Hopkins, that made this mischief.

. . . . . .

All these accused him strongly; which he fain
Would have flung from him, but, indeed, he could not:
And so his peers, upon this evidence,
Have found him guilty of high treason. Much
He spoke, and learnedly, for life: but all
Was either pitied in him, or forgotten.

. . . . . .

When he was brought again to the bar,—to hear
His knell rung out, his judgment,—he was stirr'd
With such an agony, he sweat extremely,
And something spoke in choler, ill and hasty:
But he fell to himself again, and, sweetly,
In all the rest show'd a most noble patience."[4]

This narration of the trial of the duke of Buckingham, for treason, is the same as the histories of the trial give

[1] Tiedeman, R. P. (3d ed).
[2] This statute was passed during the reign of Edw. I.
[3] Tiedeman, R. P. *supra.*
[4] King Henry VIII, Act II, Scene I.

it.[1] The conviction of the Duke occurred in the tenth year of the King's reign, upon the most flimsy pretexts, such as the charge that he had declared all the acts of Henry VII to be improperly done. To encompass the conviction, the Chief-Justice held that "if one intend the death of the king it is high treason, for that he is the head of the commonwealth," though no act be done, and the guilty intent to commit the treason, was established by words alone.[2] History records that the execution of this Duke was obtained by the pressure of the royal power, without a pretence of legal cause,[3] and certain it is that no act since the commencement of this reign, when the tyranny of the Star Chamber was inaugurated, to coerce and overrule the peers and members of parliament, so aroused and terrified the populace and made the way for the arbitrary power, which later culminated in the King's divorces and trampling under foot the sacred laws of both church and state, and the terrorizing of the people, to accomplish his arbitrary will, as this execution of the duke of Buckingham, in the name of law.[4]

Sec. 335. "Come into Court."—

"Scribe. Say, Henry, king of England, come into the court.
Crier. Henry, King of England, etc.
K. Hen. Here.
Scribe. Say, Katherine, queen of England, come into court.
Crier. Katherine, queen of England," etc.[5]

The practice was founded by the Normans, in England, of having a "crier" to make the various proclamations in court, under the direction of the judges or scribes, and the duty of this officer, as presented in this verse, was to

[1] Year-Book, 13 Hen. VIII, fol. 12.
[2] *Ante idem.*
[3] Finlason's note, to IV Reeve's Hist. Eng. Law, p. 275.
[4] Mackintosh's Hist. Eng., vol. II, c. 3.
[5] King Henry VIII, Act II, Scene IV.

call the parties litigant, when a case was on for trial, in order that the parties to the cause would be given due notice of the trial and appear in person in court.[1] The form of the old judgments, by default, was that the "defendant, being called, comes not, but makes default," etc., and this was an essential part of the decree.

So the Poet in the preliminaries leading up to the trial of the divorce suit between Katherine and Henry VIII, followed the practice obtaining then in England.

Sec. 336. Pleading cause.—

"*Wol.* You have here, lady,
(And of your choice,) these reverend fathers; men
Of singular integrity and learning,
Yea, the elect of the land, who are assembled
To plead your cause."[2]

Pleading is the formal mode of alleging or setting up the facts which constitute the support or defence of a party litigant, in a trial in a court of justice.[3] The object of pleading is to secure a clear and distinct statement before the court of the claims of the different litigants, so that the controverted points may be exactly known, examined and decided, to the end that justice may be done.

The Cardinal here, insists that the rights of the Queen are being protected according to the formal modes of the procedure obtaining at that period, as she has "men of singular integrity and learning," . . . "who are assembled to plead" her cause.

---

[1] Wharton's Law Lexicon; Bouvier's Law Dictionary.

[2] King Henry VIII, Act II, Scene IV.

[3] Coke, 48b; Coke, Litt. 303; 7 Bacon's Abr. 457.

Notwithstanding all this assurance, the Queen knew that regardless of the justice of her cause, or the power of her pleading, the Judges would decide against her, as they were impanelled to do the King's will, so her course in this trial was a wise one, since a worthy plea is not proof against a prejudiced judge.

Sec. 337. Session of court.—

"*Cam.* His grace
Hath spoken well, and justly: Therefore, madam,
It's fit this royal session do proceed."[1]

Session, is the time for which a court regularly sits for the transaction of the business which may come before it. Session is the same as a term of court, for it includes the day when the court convenes and ends on the day of the adjournment of court.[2]

In refusing the application for a continuance, by the Queen, the Cardinals desired to subserve the will of the King and rush the determination of the cause to a conclusion at that session of the court.

Sec. 338. Challenging prejudiced judge.—

"*Q. Kath.* . . . I do believe,
Induc'd by potent circumstances, that

In asking the right of an attorney for Queen Katherine, in her divorce suit, Cardinal Wolsey, addresses the King: "*Wol.* I know your majesty has always lov'd her, So dear in heart, not to deny her that A woman of less place might ask by law, Scholars, allow'd freely to argue for her." (Act II, Scene II.)

[1] King Henry VIII, Act II, Scene IV.

[2] Bouvier's Law Dictionary.

In Othello, the Moor of Venice (Act I, Scene II), the following occurs:

"*Oth.* Where will you that I go,
To answer this your charge?
Bra. To prison: till fit time
Of law, and course of direct session,
Call thee to answer."

From these lines Shakespeare places the arrest of Othello at a time when the court was not in session, but during the vacation of court and Brabantio tells him he must go to prison to await the next session of court. A session of court is when the court convenes for the trial of cases. The court consists of the judge, sheriff, clerk, jury and other court officers and the meetings of the court are called the sessions.

You are mine enemy; and make my challenge,
You shall not be my judge: for it is you
Have blown this coal betwixt my lord and me,—
Which God's dew quench: Therefore, I say again,
I utterly abhor, yea, from my soul,
Refuse you for my judge."[1]

Since impartiality is the first duty of a judge, if he has even the slightest interest or bias in a cause to be tried before him, he ought to disqualify himself from sitting as a judge, even without objection of a party interested, for the maxim is, *aliquis non debet esse judex in propria causa.*[2] If the Cardinal had had due regard to the proprieties of the situation, therefore, when the Queen publicly charged his prejudice and unfairness toward her, he would have refused to sit in judgment on her cause, regardless of the strict legal right of the Queen to challenge him because of such prejudice. But the practice obtaining at that period did not provide for such challenge on account of bias of the judge, although it did because of such bias by a juror, and she was perhaps not within the strict letter of the law, in urging this objection to the trial by Cardinal Wolsey.

---

[1] King Henry VIII, Act II, Scene IV.

[2] 8 Coke, 118.

Urging her objection to Cardinal Wolsey, because of the influence the king had over him, as her judge, Queen Katherine again said: "Again, I do refuse you for my judge; and here, before you all, appeal unto the pope, to bring my whole cause 'fore his holiness, and to be judg'd by him." (Act II, Scene IV.)

The Queen had no legal right to challenge the judge to try her, for the exceptions or challenges which go to the jurors, on their preliminary examinations, are not extended to the Judge, but the right claimed by the Queen, because of the bias and prejudice of the Judge against her, is equivalent to that now recognized by law, under what is known as the change of venue statutes, where a party can complain of the bias and prejudice of the Judge and secure an impartial tribunal to try the cause. (Coke, 1' Inst., 294.)

Queen Katherine denied the authority of the Cardinal to try the divorce case between herself and the King, as the marriage contract was both a civil contract and a spiritual rite, as viewed by the Church and she did not, according to the Catholic faith, recognize the right of a temporal Court, to sever the holy bonds. That this contention was strongly urged in the courts and many cases justified the contention, see 6 Bacon's Abr., pp. 454, 500.

The legislation during the reign of Henry VIII, showed a continuous strife and agitation against the power of the Church of Rome, principally as a means of enabling the King to avoid his different marriages. To cut off Catherine's appeal to Rome, the statute 24 Henry VIII, c. 12, was passed rehabilitating the statutes of Edward I and III and Richard II and Henry IV, against foreign jurisdiction, providing, among other things, that in all matrimonial causes, the same should be heard and finally determined within the King's jurisdiction and authority and not elsewhere, regardless of any appeals, or process from the see of Rome (IV Reeve's Hist. Eng. Law, pp. 314, 315). Prior to this statute, to show the legality of the Queen's appeal, in her divorce suit, to the Pope of Rome, it had been decided only a few years before, in this same reign, that as matrimony was a spiritual rite, where a papal bull of dispensation in a marriage had been pleaded, this would be given effect, and would make an otherwise void marriage legal, (Year-Book, 12 Henry VIII, fol. 6) and this being true, it would naturally follow that the same effect would be given on appeal from the civil courts, a conclusion likewise formerly recognized by a decision preceding the trial of the Queen's divorce suit. (Sandes' case, Year-Book, Hen. III.) True, it had been held that no appeal would lie to Rome as to causes which could be effectually determined in England. (Year-Book, Edw. V) but of course this could not apply to a cause such as a marriage contract, for this is purely a spiritual rite and one over which the Church alone had jurisdiction (Year-Book, 20 Hen. VI, 25.)

After the King's marriage to Anne Boleyn, and the act of succession, (25 Hen. VIII, c. 22) it was thought prudent by all means to stigmatize the marriage with Catherine as illegal, so a clause was inserted in the statute making all marriages illegal within the Levitical degree and of course this included a marriage to the widow of a brother. But after tiring of the Mother of Elizabeth, the King then had passed a statute, (32 Hen. VIII, c. 38) making all marriages solemnized by the Church, and followed by copulation and birth of children legal, and he soon

Sec. 339. Retainers.—

"*Q. Kath.* . . . You have, by fortune, and his highness' favours,
Gone slightly o'er low steps; and now are mounted
Where powers are your retainers: and your words,
Domestics to you, serve your will, as't please
Yourself pronounce their office."[1]

The Queen, in this verse spoke in the legal terms of lawyers. A retainer is a fee given to a lawyer to insure his future services either in the prosecution or defense of a lawsuit, or the performance of some other legal service.[2] The Cardinal, according to the expressions of the Queen, had reached such height that he did not bother with small affairs, but received retainers from the powers of the earth alone.

Sec. 340. Appearance in Court.—

"*Q. Kath.* . . . I will not tarry; no, nor ever more,
Upon this business, my appearance make
In any of their courts."[3]

Appearance, in legal practice, is the coming into court, of a party to a cause, whether as plaintiff or defendant.[4] No formality is required on the part of the plaintiff in entering his appearance for the filing of the suit does this; but on the part of the defendant, more particularity is required. Appearance may either be entered by personally appearing to the action, or by entering the appearance in a formal way, by entries of record in the court. When one desires to plead to the jurisdiction of the court,

---

afterward espoused Catherine Howard. This latter statute was to abolish the effect of the canonical decree, as this marriage was forbidden by the canon law, although not by the Levitical degree. (IV Reeve's Hist. Eng. Law, pp. 314-317; 330-335.)

[1] King Henry VIII, Act II, Scene IV.
[2] 3 Chitty, Practice, 116.
[3] King Henry VIII, Act II, Scene IV.
[4] Bouvier's Law Dictionary.

as Katherine did, in this instance, appearance by an attorney is improper, for the appointment of the attorney, as an officer of the court, would admit the jurisdiction.[1] A married woman, when sued without her husband, at common law, had the right to personally appear,[2] so Katherine had evidently had good legal advice, in pursuing the course she did in refusing to enter her appearance in the court presided over by Cardinal Wolsey.

Sec. 341. Under hand and seal.—

"*K. Hen.*. . . . Unsolicited
I left no reverend person in this court;
But by particular consent proceeded,
Under your hands and seals."[3]

"Under hand and seal," are formal words, in the law, indicating the formal execution of a document, required to be sealed, to give it validity. It is the customary manner of closing a written document, to be executed by two or more, the formal words being, "Witness our hands and seals," or "Under our hands and seals," as adopted by the King here. The King is addressing himself to the law members of his court, assuring them that he had acted in a disinterested manner, having the writs issued in a legal, formal manner, by leaving no "reverend person"

[1] 5 Watts & S., 215.

[2] 1 Chitty, Pl. 398.

The Poet treats the entry of an appearance in the legal way and after Katherine had questioned the jurisdiction of the Court, she left, so that she would not be held to have waived the question of the court's jurisdiction over her person. As an appearance is treated as a voluntary entry of one's person into court and dispenses with the necessity of process, the good Queen thus claimed her rights in a strictly legal manner and did not pursue a course that would estop her from afterward treating the proceeding as a nullity or questioning the jurisdiction of the court, over her person. (Bouvier's Law Dictionary.)

[3] King Henry VIII, Act II, Scene IV.

in the court, but proceeding "under . . . hands and seals." If certain judicial writs were presented without the prerogative seal, they were void; the officer sealing such writs was called the "sealer of writs," and the undue prominence given by the Poet to the seals attached to these writs, shows his familiarity with the requirements of the practice obtaining in such cases.[1]

Sec. 342. Motion to dismiss appeal.—

"*Cam.* . . . Meanwhile must be an earnest motion
Made to the queen, to call back her appeal,
She intends unto his holiness."[2]

A "motion," in legal practice, is the application of one of the parties to a cause, or his counsel's application, for him, for some rule or order which he thinks is necessary, in the ordinary progress of the cause, to get relieved from some matter which would work injustice, if the motion were refused.[3] The Cardinal observes that the Queen's appeal will delay the termination of the King's suit for divorce and recommends that "earnest motion" shall be made to persuade her to dismiss her appeal to the Pope.

Sec. 343. Dilatory pleas.—

"*K. Hen.* I may percieve,
These cardinals trifle with me: I abhor
This dilatory sloth and tricks of Rome."[4]

Dilatory pleas are those which have for their object the dismissal, suspension, or obstruction of a suit, without touching the merits of the controversy, until the impediment or obstacle insisted upon shall be removed.[5] The Queen's course in this divorce suit, came within the class

---

[1] 3 Coke, Inst., 169.
[2] King Henry VIII, Act II, Scene IV.
[3] 3 Bl. Comm. 305.
[4] King Henry VIII, Act II, Scene IV.
[5] Bouvier's Law Dictionary.

of pleas known as dilatory pleas, in that she did not want to submit herself to the jurisdiction of the court, or meet the cause on its merits, but endeavored to obstruct the proceeding by other than a trial on the merits.

The King here objects to the tactics followed by the Queen and the Cardinals in granting her additional time, in the cause. First, she asked for a continuance of the cause, to enable her to confer with her friends in Rome, and this being denied her, she objected to the proceeding, before Cardinal Wolsey, because of his bias and prejudice against her; this being denied her, she questioned the jurisdiction of the court; refused to enter her appearance and left the court. The Cardinals then decided that they had no jurisdiction, unless they could persuade her to withdraw or dismiss her appeal to Rome and of this practice, the King complained, and called it "dilatory sloth."

Sec. 344. Adjournment of court.—

"*Cam.* So please your highness,
The queen being absent, 'tis a needful fitness
That we adjourn this court till further day."[1]

Adjournment of court is to put off or re-set another day for the trial of a cause, or the transaction of the business of the court.[2] Adjournments are either *sine die,* or to court in course, or temporary or until some other day, before the regular term of court, in course. The adjournment mentioned by the Cardinal here, is the latter kind and was made necessary by the action of the Queen, in refusing to enter her appearance and to submit to the jurisdiction of the court over her person.

[1] King Henry VIII, Act II, Scene IV.
[2] 2 Sh. Bl. Comm. 186.

Menenius tells Brutus, in Coriolanus: "*Men.* . . . you wear out a good wholesome forenoon, in hearing a cause between an orange-wife and a fosset-seller; and then rejourn the controversy of three-pence to a second day of audience." (Act II, Scene I.)

Sec. 345. Trial at law.—

"*Cam.* . . . , if the trial of the law o'ertake you,
You'll part away disgrac'd."[1]

A trial at law, is the examination, before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue.[2] The object of the threat of the Cardinal was to deter the Queen from her course in insisting upon her appeal to Rome, or a trial according to the forms of law, and the inducement is held out that the King, because of his previous regard for her, will deal more gently with her than a court, influenced by him would do, and that she had better avoid a trial at law, because of the resulting disgrace that would accrue to her, from this proceeding. Of course this was a subterfuge, to assist the King in his unholy inclinations.

Sec. 346. Inventory.—

"*K. Hen.* Forsooth, an inventory, thus importing,—
The several parcels of his plate, his treasure,
Rich stuffs and ornaments of household; which
I find at such proud rate, that it out-speaks
Possession of a subject."[3]

An inventory is a list, schedule, or enumeration, in writing, containing, article by article, the goods and chattels, rights and credits, together with the lands and tenements of a person or persons.[4]

---

[1] King Henry VIII, Act III, Scene I.

[2] 3 Bl. Comm. 333.

[3] King Henry VIII, Act III, Scene II.

[4] 2 Bl. Comm. 514; 4 Bacon's Abr., 86.

Surrendering his earthly effects to the king, after the issuance of the writ of *praemunire* against him, Cardinal Wolsey said, in King Henry VIII:

"*Wol.* And,—pr'ythee, lead me in:
There take an inventory of all I have,
To the last penny; 'tis the kings." (Act III, Scene II.)

The King here enumerates the articles composing the inventory, or the general classes of the assets of the Cardinal, such as his plate, treasures, etc., which would naturally be the form of the legal inventory, if the same were prepared by a lawyer. The list totaling so much as to show the dangerous nature of the Cardinal's acquisitions the King concludes to confiscate his property, under the writ of *praemunire,* known to the law at that time.

Sec. 347. Commission for office.—

"*Wol.* Stay,
Where's your commission, lords? words cannot carry
Authority so weighty."[1]

A commission, in law, in the sense used by the Cardinal, is a written document, in the nature of letters-patent, granted by the King or Government, under the public seal, to persons appointed to an office, giving authority to perform the duties of the office.[2]

The Cardinal will not take the mere words of the Lords, for their authority to thus confiscate his office and immure his person, but demands their commission, or authority from the king.

Sec. 348. Writ of Praemunire.—

"*Suff.* Lord cardinal, the king's further pleasure is,
Because all those things, you have done of late

Taunting Cardinal Wolsey over the lost inventory of his riches, at the expense of the King, King Henry VIII said to him: "*K. Hen.* Good my lord, you are full of heavenly stuff, and bear the inventory, of your best graces in your mind." (Act III, Scene II.)

A citizen, speaking of the wrongs suffered at the hands of Caius Marcius, in Coriolanus, said: "1 *Cit.* . . . the leanness that afflicts us, the object of our misery, is as an inventory to particularize their abundance." (Act I, Scene I.)

[1] King Henry VIII, Act III, Scene II.

[2] Rutherforth, Inst., 105.

By your power legatine within this kingdom,
Fall into the compass of a *præmunire*,—
That therefore such a writ be sued against you;
To forfeit all your goods, lands, tenements,
Chattels and whatsoever, and to be
Out of the king's protection:—This is my charge."[1]

A writ of *praemunire* was a writ addressed to a representative of the Pope to compel the restitution of property taken without the authority of the civil Government, and to punish the papal representative for his act in maintaining the Pope's authority, in defiance of the rights of the Civil Government.[2] The writ owed its existence to certain statutes passed during the reign of Edward I and later reigns and was due to the growing tendency upon the part of the Government, to restrain, within proper limits, the grasping hand of the Roman church, in civil affairs. The writ provided for the enforcement of these statutes used the words *praemunire facias,* to command a citation of the guilty person, hence this name was applied not only to the writ, but to the offense of maintaining the Papal power, in defiance of the civil authorities.[3]

The Cardinal is charged with having, while acting for the Pope, defied the civil authority of the King, and hence of having fallen "into the compass of a praemunire," his goods and tenements are declared forfeited and he is without the protection of the king.

---

[1] King Henry VIII, Act III, Scene II.

[2] Coke, Litt. 129.

[3] Coke, Litt. 129; 7 Bacon's Abr., 690, 694.

As presented by the Poet, the proper form of judgment in a *praemunire*, at the suit of the king was against the defendant, "that he be out of the protection of the king; that his lands and tenements, goods and chattels, shall be forfeited to the king." Coke, Litt. 129b; 3 Coke, Inst., 125, 218; 7 Bacon's Abr., p. 693.

For history of the law upon the writ of praemunire, see III Reeve's Hist. Eng. Law, pp. 122, 123.

Sec. 349. Decree of divorce from Katherine.—

"1 *Gent.* . . . The archbishop
Of Canterbury, accompanied with other
Learned and reverend fathers of his order,
Held a late court at Dunstable, six miles off
From Ampthill, where the princess lay; to which
She oft was cited by them, but appear'd not:
And, to be short, for not appearance, and
The king's late scruple by the main assent
Of all these learned men she was divorc'd,
And the late marriage made of none effect."[1]

In this verse, the Poet shows that the decree of divorce from his marriage with Katherine, was by default, as she failed to enter her appearance, although "she oft was cited by them," and the king was thereby adjudged to have never contracted a lawful marriage with her.

The basis for this judgment was the king's scruple, or his conscience, which was the reason assigned why his marriage was void, since it was within the Levitical degree, and against the mandate of the statute. (32 Hen. VIII, c. 38.)

Katherine's appeal was disallowed by the "reverend fathers of his order," and by the Archbishop of Canterbury, since it was concluded by them that the marriage was within the Levitical degree and the temporal and not the spiritual courts had cognizance of the offense, if the marriage was illegal, which they decided it to be.

The prohibition by the Levitical law, was carried to uncles and nieces, aunts and nephews, because upon the death of father and mother, they come into the law as standing in *loco parentis*, and it was considered necessary to propagate the same reverence of blood as if the relatives were of nearer relationship.[2]

---

[1] King Henry VIII, Act IV, Scene I.

[2] 6 Bacon's Abr., p. 458, *et seq.*

This late Court at "Dunstable, six miles off," to which Queen Katherine was "oft cited," and which was presided over by the

Sec. 350. Simony.—

"*Kath.* . . . He was a man
Of an unbounded stomach, ever ranking
Himself with princes: one, that by suggestion
Ty'd all the kingdom: simony was fair play;
His own opinion was his law: I'the presence
He would say untruths; and be ever double,
Both in his words and meaning."[1]

Simony, at the common law, was the buying or selling of holy orders or of ecclesiastical benefices. In other words, it was an unlawful agreement to receive temporal rewards for something holy or spiritual.[2]

The offense of simony was regarded with such severity, at the common law, that a general pardon, was held not to extend to one guilty of this offense;[3] but "neither the consideration of the greatness of the offense of simony, nor the provision made against it by the canon or common law, was sufficient to put a stop to this offense," as ob-

"learned men," named by the Poet, as the action referred to was judicially reported, on the Queen's failure to appear, after service of the citations, treated her as in contempt; and decreed that her "pretended marriage always was and still is null and invalid; that it was contracted and consummated contrary to the will and law of God; that it is of no force or obligation and that it always wanted and still wants, the strength and sanction of law." (1 State Trials, 259, 260.) This decision, of course, was in subserviance to the will of the King, regardless of the legality of the marriage, but if the first premise had been well taken, then the conclusion was right, for a contract or other act, which is void,—aside from the marriage contract, which on grounds of public policy will be upheld, after many years to legitimize children born during the existence of the relation—is not helped by lapse of time, but the maxim is, "*Quod ab initio non valet intractu temporis non convalescet*," or as this is usually translated, that which was void, in the beginning, cannot be made valid by lapse of time, so the decree, as the Poet gives it, and as it was, in fact, had the outward semblance to legality.

[1] King Henry VIII, Act IV, Scene II.

[2] Bouvier's Law Dictionary.

[3] 9 Bacon's Abr., 23.

served by Matthew Bacon, in his Abridgment,[1] so it was at length prohibited, under severe penalties, by the statute 31 Elizabeth, c. 6, enacted during the life of the Poet.

Sec. 351. Purging one's self of guilt.—

"*K. Hen.* . . . I know,
You cannot with such freedom purge yourself,
But that, till further trial, in those charges,
Which will require your answer, you must take
Your patience to you and be well contented
To make your house our tower."[2]

Purging one's self of crime, at common law, was the clearing of one's self of an offense charged, by denying the guilt on oath or affirmation.[3]

Canonical purgation was the denial of the offense, before at least twelve persons, who would state that they believed the accused, while vulgar purgation, consisted of superstitious trials by hot and cold water, by fire, by hot irons and such like barbarities that tried the temper and nerve of the accused one.[4]

The purgation referred to by the King, in this instance, was rather that of the canonical purgation, until which, he advises the Tower and patience.

Sec. 352. Verdict based on perjury.—

"*K. Hen.* . . . not ever
The justice and the truth o' the question carries
The due o' the verdict with it: At what ease

---

[1] 9 Bacon's Abr., 6.

For discussion of the common law offense of simony and history of the legislation in England, to prevent this offense, see V Reeve's History Eng. Law, p. 192.

[2] King Henry VIII, Act V, Scene I.

[3] Bouvier's Law Dictionary.

[4] 3 Bl. Comm. 341.

Might corrupt minds procure knaves as corrupt
To swear against you? such things have been done."[1]

The King here warns his friend against the danger of a perjured witness or two being used against him, at his trial. Of course, if evidence which is not true should be offered on the trial of any issue, then "the justice and the truth o' the question," would not carry "the due o' the verdict with it," but wrong would triumph, instead of right and falsehood, instead of truth, prevail. The prevalency of the crime of perjury, about the time at which the trial was to be had, is a sufficient excuse for the King's admonition, as to the ease with which "corrupt minds procure knaves as corrupt to swear against you," for the severity of the offense, according to the statutes,[2] and the punishment either of imprisonment, or by the pillory, did not seem to abate the crime, until the enactment of the 29 Elizabeth, c. 5, by which the severity of the punishment was increased.[3]

Sec. 353. Accusing one, face to face.—

"*Cran.* . . . I do beseech your lordships,
That, in this case of justice, my accusers,
Be what they will, may stand forth face to face,
And freely urge against me."[4]

The accused here, but asked what the law accorded him, had his trial been in a temporal court, for Magna Charta provided that "no freeman shall be taken or imprisoned, . . . except by legal judgment of his peers,

[1] King Henry VIII, Act V, Scene I.

[2] 7 Bacon's Abr., 424-438.

[3] Coke, 3' Inst., 163-168; 4 Bl. Comm. 137-139.

King Henry VIII tells Cranmer, in warning him against his approaching trial: "*K. Hen.* . . . Ween you of better luck, I mean of perjur'd witness, than your master, Whose minister you are, whiles here he liv'd Upon this naughty earth." (Act V, Scene I.)

[4] King Henry VIII, Act V, Scene II.

or the law of the land."[1] By the organic provisions of the United States Constitution, each person accused of crime is entitled to have the witnesses brought "face to face" before him,[2] as Cranmer prayed, in this instance, and in denying him this right, he was clearly denied one of the rights of an accused citizen, as recognized by English law.

Sec. 354. Accusing Counsellor.—

"*Suf.* Nay, my lord,
That cannot be: you are a counsellor,
And, by that virtue, no man dare accuse you."[3]

The excuse for denying Cranmer the benefit of having the accusers against him, appear "face to face," is made that since he is a King's Counsellor, no man dare accuse him. The King's counsel were those barristers who were selected by him to be of counsel for the realm and because of their nearness to the king's person, the plea is urged that no one dare make accusations against one so employed, without privilege so to do from the king.

Sec. 355. Acting as both judge and juror.—

"*Cran.* . . . if your will pass,
I shall both find your lordship judge and juror."[4]

Cranmer objects to the trial being had by one occupying the position of both judge and juror, for while it was the province of the jury to determine only issues of fact, and of the judge to pass upon issues of law, if both func-

[1] 4 Bl. Comm. 423; 2 Coke, Inst., 39.

[2] The accused, by Constitution of the U. S. is entitled to be confronted with the witnesses against him. U. S. Con. Art. VI.

[3] King Henry VIII, Act V, Scene II.

In Othello, after Iago's coarse speech, Desdemona asks Cassio: "How say you, Cassio: is he not a most profane and liberal counsellor?" (Act II, Scene I.)

[4] King Henry VIII, Act V, Scene II.

tions are to be discharged by one acting in both capacities, he intimates that because of the prejudice of the Lord, he would lose his rights.

Sec. 356. Crime of heresy.—

"*Gar.* My lord, my lord, you are a sectary,
That's the plain truth: your painted gloss discovers,
To men that understand you, words and weakness."[1]

A sectary, or sectarian, in religion, is one who separates himself from an established church, and adheres to some sect, or following, at variance with the established religion. The offense, at common law, was known as heresy, which consisted not in the total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed.[2]

Sec. 357. Appeal by king's ring.—

"*Cran.* . . . I have a little yet to say. Look there, my lords;
By virtue of that ring, I take my cause
Out of the gripes of cruel men, and give it
To a most noble judge, the king, my master.
Cham. This is the king's ring.
Sur. 'Tis no counterfeit.[3]

This refers to the custom of regarding the holder or possessor of the king's private ring, as entitled to the pre-

[1] King Henry VIII, Act V, Scene II.

[2] Blackstone's Comm.

The accusation against Cranmer, reminds us of what Milton said: "I never knew that time in England, when men of truest religion were not counted sectaries."

[3] King Henry VIII, Act V, Scene II.

The King tells Cranmer, in King Henry VIII: "*K. Hen.* . . . if entreaties will render you no remedy, this ring deliver them and your appeal to us there make before them." (Act V, Scene I.)

rogatives of the king's person and to be exempt from the punishment he would otherwise be accorded, were he not invested with this insignia of royalty. The custom obtained at this time, of offering the ring of the king, which was construed as a claim of the royal prerogative, by the king, of himself passing judgment upon the accused person and of denying to the court the right to proceed with a cause. Hence, Cranmer says he takes his cause out of their jurisdiction, by the ring.

We find, in the book of Esther, that "This was the custom, that no man durst gainsay the letters which were sent in the King's name, and were *sealed with his ring.*" (Esther, ch. VIII, 8.) See, also, "The Castle of Otranto," p. 100.

CHAPTER XXVI.

"TROILUS AND CRESSIDA."

Sec. 358. Ravishment.
359. Per se.
360. Justice residing between right and wrong.
361. Impressment for military service.
362. Attestation.
363. Damage and indemnity of war.
364. Law's protection of marital relation.
365. A "privileged man."
366. Underwriting one.
367. A kiss in fee farm.
368. Execution of contract by parties "interchangeably."
369. Right warring with right.
370. Consanguinity.
371. Rejoindures.
372. Attestation by "sight and hearing."

Sec. 358. Ravishment.—

"*Pro.* . . . . The ravish'd Helen, Menelaus' queen,
With wanton Paris sleeps; And that's the quarrel."[1]

"Ravished," in criminal pleading, is a technical word essential, in an indictment for rape.[2]

No other word will generally answer and the defendant is usually charged with having "feloniously ravished," the prosecutrix, or woman mentioned in the indictment.[3]

The prologue here recognizes the condonement of the ravishment, by Helen, for it is mentioned that she "with wanton Paris sleeps," but the fact of the original rape or ravishment, is mentioned as the cause of the quarrel.

---

[1] Troilus and Cressida, Act I, Scene I.

[2] 5 Bacon's Abr., p. 48, *et seq.*

[3] The word implies that the act was forcible and against the will. 3 Chitty's Cr. Law, 812.

Sec. 359. Per se.—

"*Alex.* They say he is a very man, *per se,*
And stands alone."[1]

"*Per se,*" when used in the law, means by itself, or himself. A man's act is held to be negligence, *per se,* or when one appears as Counsel in his own cause, he is said to appear, *per se,* or by himself.

The Poet here makes Alexander refer to Troilus as a man, *per se,* meaning that he is a man, by himself, or in himself. The expression is one familiar to lawyers and courts and is used in this generic way, by law writers and courts.[2]

Sec. 360. Justice residing between right and wrong.—

"*Ulyss.* . . . Take but degree away, untune that string,
And, hark, what discord follows: each thing meets
In mere oppugnancy: The bounded waters
Should lift their bosoms higher than the shores,
And make a sop of all this solid globe:
Strength should be lord of imbecility,
And the rude son should strike his father dead:
Force should be right: or, rather right and wrong
(Between whose endless jar justice resides,)
Should loose their names, and so should justice too"[3]

The language of Ulysses is that between contending factions or by way of compromise justice is more nearly approached. In other words, in the practical administration of justice, it is found that the one who claims to be right is not always so, to the extent claimed, and the one who is claimed to have violated this right, or to have perpetrated the wrong, is not always as wrong as it is claimed, but between the two the right, or the real justice of the contention, resides.

---

[1] Troilus and Cressida, Act I, Scene II.
[2] 3 Bl. Comm. 181.
[3] Troilus and Cressida, Act I, Scene III.

This reasoning urges respect for the law, through which justice is enforced, and intimates that without such respect, might or force alone can gain control. In the practical administration of justice, the expressions are most correct, for in the permission of the law that each one shall enjoy his own, it is found not always to be in the proportion that it is urged such right should be enjoyed, but rather that "justice resides," between the "endless jar" of right and wrong.[1]

Sec. 361. Impressment for military service.—

"*Achil.* Your last service was sufferance, 'twas not voluntary; no man is beaten voluntary; Ajax was here the voluntary, and you as under an impress."[2]

The ships of the British Navy were formerly manned by impressment, and the practice had not only the sanction of custom, but the force of law and many acts of parliament were passed, from the reigns of Philip and Mary to that of George III, to regulate the system of impressment, in England.[3] The practice was to seize, by force, such seamen, rivermen and other citizens as the circumstances demanded for service in the navy. An armed

[1] Coke, 2' Inst., 56; Toullier, Droit, Civ. Fr. tit. prel. n. 5.

[2] Troilus and Cressida, Act II, Scene I.

[3] V Reeve's History English Law, 140, *et sub;* Bacon, Abr.

In Antony and Cleopatra, Enobarbus tells Cleopatra, comparing her sailors with those of Cæsar: "Your ships are not well manned; Your mariners are muleteers, reapers, people ingross'd by swift impress." (Act III, Scene VII.)

And in Hamlet, Marcellus asks Horatio:

"*Mar.* Good now, sit down, and tell me, he that knows,
Why this same strict and most observant watch
So nightly toils the subject of the land;
And why such daily cast of brazen cannon,
And foreign mart for implements of war;
Why such impress of shipwrights, whose sore task
Does not divide the Sunday from the week."

(Act I, Scene I.)

body of sailors, preceded by officers of the law usually went to the seaport towns and laid violent hands on all eligible men and conveyed them, by force to the ships of war. Under the law all men of seafaring habits between 18 and 55 years were liable to be seized, subject to certain exemptions and what was known as the "Press-gang" were authorized to board any merchant-vessel, in any port in the world and seize British subjects, a right frequently abused in different parts of the world, by English seamen.

Of course those men seized and forced to serve were not usually as good seamen as the volunteers, who went into the service willingly, and this is what Achilles means, in the lines above quoted.

Sec. 362. Attestation.—

"*Paris.* . . . But I attest the gods, your full consent

In King Richard II, the King, referring to the impressment of Bolingbroke, said:

". . . For every man that Bolingbroke hath press'd
To lift shrewd steel against our golden crown,
God for his Richard hath in heavenly pay
A glorious angel." (Act III, Scene II.)

In King Lear, Lear is made to say, to Edgar: "Nature's above art in that respect.—There's your press-money." (Act IV, Scene VI.)

And in same play, (Act V, Scene III) Edmund speaks of turning "our impress'd lances in our eyes."

Of the wonderful power of love, the maid discourses, in A Lover's Complaint:

"O most potential love: vow, bond, nor space,
In thee hath neither sting, knot, nor confine,
For thou art all, and all things else are thine.
When thou impressest, what are precepts worth
Of stale example? When thou wilt enflame,
How boldly those impediments stand forth
Of wealth, of filial fear, law, kindred, fame:
Love's arms are peace, 'gainst rule, 'gainst sense, 'gainst shame." (264, 271.)

Gave wings to my propension and cut off
All fears attending on so dire a project."[1]

Attest is here used in the sense of bearing witness[2] In law, attestation is the verification, by a witness or witnesses, of the truth of a given state of facts, which is in issue, in a given case.[3] In the law of conveyancing, attestation is the verification of the execution of the deed or will, by the witnesses who subscribe and "attest" the same.[4]

Sec. 363. Damage and indemnity of war.—

"*Pri.* . . . Thus one again says Nestor, from the Greeks;
Deliver Helen and all damage else—
As honour, loss of time, travel, expense,
Wounds, friends, and what else dear that is consum'd
In hot digestion of this cormorant war,—
Shall be struck off."[5]

The King here presents the Greek's offer to end the war, by payment of all damage, all expenses and delivery of Helen, the real cause of the Greek and Trojan war.

Damage, in law, is the indemnity or compensation paid by one who has sustained an injury, either in his person, property, or relative rights, through the wrongful act of another.[6] The wrongful act of Paris, in ravishing and abducting the queen of the Greeks, is the act for which damages is claimed and expenses and other indemnity. If damages are not paid and the other redress asked not offered, the war is to continue, but otherwise it is to be stopped. This is the proposition or peace offering and the conditions upon which alone peace can be obtained.

---

[1] Troilus and Cressida, Act II, Scene II.
[2] Rolfe's Troilus and Cressida, p. 219, notes.
[3] Bouvier's Law Dictionary.
[4] Tiedeman's R. P. (3d ed.).
[5] Troilus and Cressida, Act II, Scene II.
[6] 1 Kent's Comm. (10th ed.) 630; Bouvier's Law Dictionary.

Sec. 364. Laws protection of marital relation.—

"*Hect,* . . . Nature craves,
All dues be render'd to their owners; Now
What nearer debt in all humanity,
Than wife is to the husband? if this law
Of nature be corrupted, through affection;
And that great minds, of partial indulgence
To their benumbed wills, resist the same;
There is a law, in each well-order'd nation,
To curb those raging appetites that are
Most disobedient and refractory.
If Helen, then, be wife to Sparta's king,—
As it is known she is,—these moral laws
Of nature, and of nations, speak aloud
To have her back return'd: Thus to persist
In doing wrong, extenuates not wrong,
But makes it much more heavy."[1]

Hector places in this verse, the rights of the marital relation, upon natural laws. The thought is that the rights of the husband, which attach by virtue of the relation of the marital contract, are founded in moral and natural laws and it is a fraud upon him to trample these just and natural rights under foot. Indeed, as the language indicates, the marital relation is the basis of the family or domestic obligation, and it is necessary for the good of society that such legal relation is protected. Hector stands for the clean and pure and wholesome things in life and only asks for the benefit of the law of the domestic relation,[2] for Menelaus.

The husband is legally and morally, entitled to the society and affection of his wife and can sue for and recover damages for the interference with this relation.[3]

[1] Troilus and Cressida, Act II, Scene II.

[2] Reeve's Dom. Rel.

[3] Bishop's Mar. & Div.

Hector's conclusion is that what the law does, as between individuals, justice ought to do, between nations, as well. Rolfe's Troilus and Cressida, p. 222, notes.

But Hector places the right upon a broader and more solid foundation, that of the good of society, as a whole, hence he concludes, "these moral laws of nature, and of nations, speak aloud," in favor of the right of the husband of the ravish'd queen.

Sec. 365. A privileged man.—

"*Achil.* He is a privileged man.—Proceed, Thersites."[1]

"A privileged man" is one who has a right to commit some act, or do some thing, but for which privilege he would not have the right to do, as one who is recognized to have the right to speak slanderous words, or to write in a libelous manner of another, which he enjoys by reason of being a "privileged man."[2] The expression is purely a legal expression and is frequently used, in legal proceedings, especially in damage suits, for libel or slander, where the defense is that of a special privilege.[3]

Sec. 366. Underwriting one.—

"*Agam.* . . . Disguise the holy strength of their command,
And underwrite in a deserving kind
His humorous predominance."[4]

To underwrite is to insure or guarantee a certain result, as where one underwrites or agrees that he will make good a certain loss in a certain event, as an insurer.[5] The thought is that his "humorous predominance" shall be underwritten or guaranteed.

---

[1] Troilus and Cressida, Act II, Scene III.

[2] Heard, Libel & Slan., Sec. 89.

[3] *Ante idem.* 90, 103, 110.

Diomedes tells Troilus in Troilus and Cressida: "*Dio.* O, be not mov'd, prince Troilus: Let me be privileg'd by my place, and message, To be a speaker free." (Act IV, Scene IV.)

[4] Troilus and Cressida, Act II, Scene III.

[5] Bouvier's Law Dictionary.

Sec. 367. A kiss in fee-farm.—

"*Pan.* . . . Alas, the day, how loath you are to offend day-light: and t'were dark, you'd close sooner So, so; rub on, and kiss the mistress. How now? a kiss in fee-farm? build there, carpenter, the air is sweet."[1]

Pandarus, on seeing the lovers kiss, asks if it is to be a kiss "in fee-farm," intending to enquire if there is to be no "fealty" or other obligations, on the part of the one kissed, meaning to place Cressida, as the tenant, rendering her rent to the lord paramount. "A fee-farm tenant" was one who held of another in fee, or in perpetuity at an annual rental, generally in kind, rendering only fealty and no other services being required, unless according to the enfoeffment, such were required.[2] Pandarus advises the full enjoyment of the relation the lovers occupy and without let or hindrance proposes that this relation shall continue for life, or forever, by the token of the kiss.

Sec. 368. Execution of contract by parties "interchangeably".—

"*Pan.* Words pay no debts, give her deeds: but she'll bereave you of the deeds too, if she call your activity in question. What billing again? Here's—*In witness whereof the parties interchangeably*—Come in, come in; I'll go get a fire."[3]

Pandarus here suggests the pre-contract of marriage which will serve Cressida for a marriage contract, in law, and actually closes the form of the contract with the formal words, used in law, at the end of such contracts, i. e., "*In Witness whereof, the parties interchangeably,*" of the scrivenor, in the preparation of such contracts.

One making a pre-contract of marriage, was held incapable of afterwards entering into a similar contract

[1] Troilus and Cressida, Act III, Scene II.

[2] 2 Bl. Comm. 43; Cowel, Spellman, Gloss.

[3] Troilus and Cressida, Act III, Scene II.

with another; provided it was made *per verba de presenti,* it was held to be, in fact, a marriage, with all the legal requirements.[1]

The closing part of such a contract, in recognition of the mutual binding effect of the covenants, as those existing interchangeably, or *inter partes*, simply recognizes what the law implies, of course, that the terms of the contract apply to more than one, or to both parties to the agreement alike, but the technical sense of the expression, by its long use and currency is so understood that it is rarely dispensed with, in agreements between two or more persons.[2]

Sec. 369. Right warring with right.—

"*Tro.* . . . O virtuous fight,
When right with right wars, who shall be most right?"[3]

In the contests for the enforcement of right, right is generally pitted against wrong, hence the anomaly of right contending with right, suggests the difficulty of making correct decision.

Of course if both parties were right, the fight would be a virtuous one, for virtue would dwell on both sides, hence the conclusion that it would be an open enquiry who would be "most right."

Sec. 370. Consanguinity.—

"*Cres.* . . . . I will not, uncle: I have forgot my father;
I know no touch of consanguinity:
No kin, no love, no blood, no soul so near me,
As the sweet Troilus."[4]

---

[1] 6 Bacon's Abr., 454, *et seq.*
[2] 5 Coke, 182; Lawson Contracts (3' ed.), 405.
[3] Troilus and Cressida, Act III, Scene II.
[4] Troilus and Cressida, Act IV, Scene II.

Cressida here denies the obligations of the relation among all the different persons descending from the same common stock or ancestor. Consanguinity is either collateral or lineal, and it is the latter kind, of which the Poet speaks, in this verse, for Cressida has descended from her father and claims that she has forgotten him. She declares that she knows "no kin, no love, no blood" . . . so near as the "sweet Troilus."

Sec. 371. Rejoinders.—

"*Tro.* . . . injury of chance
Puts back leave-taking, justles roughly by
All time of pause, rudely beguiles our lips
Of all rejoindure, forcibly prevents
Our lock'd embrasures, strangles our dear vows
Even in the birth of our own laboring breath."[1]

In pleading, at common law, the defendant had the right of rejoinder or answer to the plaintiff's replication, or reply to the original answer of the defendant, in a civil cause. A rejoindure, in pleading thus contemplated a former answer and a former reply and then a rejoindure.[2] The injury arising from the immediate separation Troilus treats as a cause preventing further rejoindure, as well as the cause of dispensing with further "embrasures," even in the birth of their "laboring breath."

Lineal consanguinity is that which recognizes the descent or ascent in a direct line, as daughter and parent; collateral consanguinity is that which refers to persons descending from the same common ancestor, but not from each other. 2 Bl. Comm. 202.

[1] Troilus and Cressida, Act IV, Scene IV.

[2] Coke, Litt. 304; Archbold, Civil Pl. 278.

This plea by way of rejoindure, in most of the United States is now prevented and the answer of the defendant is the only plea he has.

Sec. 372. Attestation by sight and hearing.—

"*Tro.* . . . Sith yet there is a credence in my heart,
An esperance so obstinately strong,
That doth invert the attest of eyes and ears."[1]

An attesting witness to an instrument, at common law, was one, who, at the request of the parties executing it, signed his name, in evidence of his having witnessed the execution of the contract.[2]

The attesting witness was not required to witness the parties execute the instrument, but it was only required that he sign in their presence, at their request and that they acknowledge that they had executed it.[3] Of course if he actually saw and heard them say they signed it, then he would attest it by both "sight and hearing"; then he would have the best primary evidence of the fact attested, or proved, and Troilus here, wishes that his eyes and ears had deceived him, or that this primary evidence should prove wrong.

[1] Troilus and Cressida, Act V, Scene II.
[2] 3 Campb. 232.
[3] 2 Greenl. Evid., Sec. 678.

CHAPTER XXVII.

"TIMON OF ATHENS."

Sec. 373. Pawn.
374. Death penalty for homicide.
375. Joint and corporate action.
376. Hereditary taints.
377. Pity the virtue of Law.
378. Plunging into Law.
379. Defending manslaughter.
380. Killing in self-defense.
381. Felon in irons.
382. "Law is strict."
383. A cynic's view of Law—Thievery justified.
384. Bawds not competent witnesses.
385. Pleading false titles.
386. The scope of Justice.
387. Answering public Laws.

Sec. 373. Pawn.—

"*Old. Ath.* Most noble lord,
Pawn me to this your honour, she is his."[1]

A pledge or pawn is a bailment of personal property as security for some debt or engagement.[2] The Old Athenian asks Timon of Athens to pledge or pawn his honour, instead of his personal property and he will take this as security for the performance of the engagement referred to. In other words, he will consent to the alliance, if the honour of Timon is given him, as security that the husband of his daughter shall be endowed equally with his daughter.

---

[1] Timon of Athens, Act I, Scene I.

[2] Story, Bailments, Sec. 286; Lawson, on Bailments, sec. 1.

Alcibiades thus pleads for the life of his client in Timon of Athens: "*Alcib.* . . . And, for I know your reverend ages love, security, I'll pawn my victories, all my honour to you, upon his good returns." (Act III, Scene V.)

Sec. 374. Death penalty for homicide.—

"*Tim.* Whither art going?
Apem. To knock out an honest Athenian's brains.
Tim. That's a deed thou'lt die for.
Apem. Right, if doing nothing be death by the law."[1]

Timon here advises Apemantus that under the Athenian law, to knock out the brains of an Athenian, will subject him to the death penalty, for homicide was punishable by death by the law of Athens.[2] But the philosopher reminds him that his threat was to knock out the brains of an "honest Athenian" and intimates that since he could not find such a one, his offense would be doing nothing.

Sec. 375. Joint and corporate action.—

"*Flav.* . . . They answer, in a joint and corporate voice,
That now they are at fall, want treasure, cannot
Do what they would."[3]

"A joint and corporate voice," would be as one body, or with one voice, since a corporate entity, in law, is an

---

Aufidius, in condemning Coriolanus, for sparing Rome, said: "*Auf.* I rais'd him and I pawn'd mine honour for his truth." (Act V, Scene VI.)

Speaking of the lax morals of Antony, Cæsar said to Lepidus, in Antony and Cleopatra:
"*Caes.* . . . 'tis to be chid
As we rate boys; who, being mature in knowledge,
Pawn their experience to their present pleasure,
And so rebel to judgment." (Act I, Scene IV.)

Imogen, in her talk with Iachimo, in Cymbeline, agrees, if he leaves his alleged box of jewels in her care, to "pawn" her "honour for their safety." (Act I, Scene VII.)

In King Lear, Kent says to the King: "My life, I never held, but as a pawn, To wage against thine enemies." (Act I, Scene I.)

[1] Timon of Athens, Act I, Scene I.
[2] Hugo's Histoire du Droit, 161.
[3] Timon of Athens, Act II, Scene II.

association of persons united into one legal person, or corporation.[1] Flavius tells his master that all the friends he had applied to had the same excuse, or with one "joint and corporate voice" gave him the same answer.

Sec. 376. Hereditary taints.—

"*Tim.* . . . These old fellows
Have their ingratitude in them hereditary:
Their blood is cak'd, 'tis cold, it seldom flows."[2]

As in the description of the character of Richard III and other plays, the Poet here indicates that he believed in hereditary transmission of peculiar types or traits. Any kind of property which is the subject of inheritance is called hereditary property or hereditament?[3] Of course ingratitude is not a species of property that can be so transmitted, but like other hereditary taints or peculiarities might be said to appear in successive generations.

---

[1] 2 Bacon's Abr., 436.

[2] Timon of Athens, Act II, Scene II.

[3] 2 Bl. Comm. 17; Coke, Litt., 5b.

Timon thus curses Athens and her institutions: "The Senator shall bear contempt hereditary, the beggar native honour." (Act IV, Scene III.)

Timon of Athens tells Apementus: "*Tim.* If thou wilt curse, thy father, that poor rag, Must be thy subject; who, in spite, put stuff to some she-beggar, and compounded thee, poor rogue hereditary." (Act IV, Scene III.)

Menenius tells Brutus, in Coriolanus: "*Men.* . . . Yet you must be saying Marcius is proud; who, in a cheap estimation, is worth all your predecessors, since Deucalion; though, peradventure, some of the best of them were hereditary hangmen." (Act II, Scene I.)

On Cæsar's complaint of Antony's faults, Lepidus is made to say, in Antony and Cleopatra:

"*Lep.* His faults, in him, seem as the spots of heaven,
More fiery by night's blackness; hereditary,
Rather than purchas'd; what he cannot change,
Than what he chooses." (Act I, Scene IV.)

Sec. 377. Pity the virtue of law.—

"*Alcib.* I am an humble suitor to your virtues;
For pity is the virtue of the law,
And none but tyrants use it cruelly."[1]

Pity or mercy is said to be the saving grace of all systems of criminal jurisprudence, and the partial or total remission of punishment, before sentence,[2] seems to call forth the universal approval of Shakespeare, for with his broad view of human life and his charity, it is but natural that he would always "temper justice with mercy." Such is peculiarly the Poet's sphere, for the emotional side of life could but appeal to the imagination of one so thoroughly attuned to the weaknesses and foibles of his kind and possessed himself with the "divine gift of pity," he would naturally want to temper harsh laws with this virtue.

Sec. 378. Plunging into law.—

"*Alcib.* . . . It pleases time and fortune, to lie heavy
Upon a friend of mine, who, in hot blood,
Hath stepp'd into the law, which is past depth
To those that, without heed, do plunge into it."[3]

The old General in this verse, is made to state a fact well known to lawyers, that when one rushes into law, with a cause, he has frequently a long while to relent at his leisure. The moral suggested by the Poet is that one should be quite sure of one's position before rushing into law, for otherwise he may discover, unless he heed, that he is "past depth" in the meshes of the law.

---

[1] Timon of Athens, Act III, Scene V.

[2] 1 Kent's Comm. 265.

The false Tamora, is made to plead for mercy, in Titus Andronicus, as follows:

"*Tam.* Wilt thou draw near the nature of the gods?
Draw near them, then, in being merciful;
Sweet mercy is nobility's true badge." (Act I, Scene II.)

[3] Timon of Athens, Act III, Scene V.

Sec. 379.—Defending manslaughter.—

"1 *Sen.* You undergo too strict a paradox,
Striving to make an ugly deed look fair:
Your words have took such pains, as if they labour'd
To bring manslaughter into form, set quarrelling
Upon the head of valour; which, indeed,
Is valour misbegot, and came into the world
When sects and factions were newly born."[1]

The Senator is made to suggest to Alcibiades that he actually puts a good, seemly outside upon the crime of manslaughter, to assist his client to avoid the penalty for his rash act in taking the life of one of his fellows. Manslaughter is the unlawful killing of a human being, without malice, express or implied.[2] As Alcibiades and the Senator are careful not to call the killing, in this instance by the name of murder or homicide, but to discriminate, the element of willfulness or malice being wanting, the Poet of course knew and understood the different elements that go to constitute the various degrees of this offense.

Sec. 380. Killing in self-defense.—

"*Alcib.* . . . To kill, I grant, is sin's extremest gust,
But, in defense, by mercy, 'tis most just."[3]

The right of self-defense is said to be based upon the first law of nature and so the courts and all laws recognize that to take human life in the defense of one's own person, is not murder.[4] Alcibiades urged this defense for his client, in an appropriate and proper plea, for what criminal lawyer could select more appropriate words in which to couch his plea than by admitting the crime of murder, he drew the just distinction between the willful killing and the defense of one's person, in the Poet's words?

[1] Timon of Athens, Act III, Scene V.
[2] 4 Bl. Comm. 190.
[3] Timon of Athens, Act III, Scene V.
[4] 1 Bl. Comm. 180; 2 Rolle, Abr., 547.

Sec. 381. Felon in irons.—

"*Alcib.* . . . if there be such valor in the bearing,
what make we
Abroad? why then, women are more valiant,
That stay at home, if bearing carry it;
And th' ass, more captain than the lion; the felon,
Loaded with irons, wiser than the judge,
If wisdom be in suffering."[1]

A felon is one who has been convicted and sentenced for a felony, or for the higher degrees of crime.[2] Until sentence, the party accused would not necessarily be kept in irons, so the correct word is used to indicate one, tried and convicted and properly placed in irons. If "wisdom be in suffering," the pleader urges that the "felon, loaded with irons" could be considered "wiser than the judge," for of course his suffering is the more severe.

Sec. 382. "Law is strict."—

"*Alcib.* . . . If by his crime, he owes the law his life,
Why, let the war receive't, in valiant gore;
For law is strict, and war is nothing more."[3]

Alcibiades urges that his client may be sent to war to fight for his country, instead of being made to suffer the penalty of the law and put to death, where he can do himself or his country no service.

The plea is that frequently urged for felons, by their legal representatives and by custom the plea was frequently granted.[4]

The statement that the "law is strict," accords with the Poet's general idea of law, for he recognized the law as an iron rule of conduct that must not be removed for the benefit of individuals, but enforced for the benefit of the

[1] Timon of Athens, Act III, Scene V.
[2] Coke, Litt. 391.
[3] Timon of Athens, Act III, Scene V.
[4] Benet, Mil. Law; Selden, Tit. Hon.

public at large. In continuously having his characters seek a mollifying construction of the law, he sought to assist it, in places where its strictness and universality needed softening or tempering.

Sec. 383. A cynics' view of law—Thievery justified.—

"*Timon.* . . . I'll example you with thievery:
The sun's a thief, and with his great attraction
Robs the vast sea; the moon's an arrant thief,
And her pale fire she snatches from the sun;
The sea's a thief, whose liquid surge resolves
The moon into salt tears; the earth's a thief,
That feeds and breeds by a composture stolen
From general excrement; each thing's a thief.
The laws, your curb and whip, in their rough power
Have uncheck'd theft."[1]

In attempting to induce the bandits to further acts of thievery and robbery, by instancing the natural sources of power and growth—as though it was a natural law to steal—the Poet presents a misanthrop's view of life as an inducement whereby he can cause misery to his fellows. Of course the very opposite of this view is the correct principle to act upon, for if thievery and lawlessness will cause misery—which is Timon's object—then an adherence to the principle which compels a due regard to the rights of others, will, by a parity of reasoning, bring happiness.

In calling the bandits' attention to the fact that the laws not only curbed, controlled and prevented their acts of robbery and pillage, but likewise whipped them, or punished them for their infractions, the Poet grasped and expressed the dual objects of criminal laws, not only to command the right, but to also punish the wrong, without which they would, of course, be ineffectual, as laws.[2]

[1] Timon of Athens, Act IV, Scene III.

[2] Of this passage, Doctor Rolfe observes, in his Timon of Athens (notes, p. 212): "This seems to be a cynical reference

Sec. 384. Bawds not competent witnesses.—

"*Tim.* Hold up, you sluts,
Your aprons mountant: You are not oathable,—
Although, I know, you'll swear, terribly swear,
Into strong shudders, and to heavenly agues,
The immortal gods that hear you,—spare your oaths."[1]

Timon tells Phrynia and Timandra, that because of their infamous lives, they are not competent witnesses; that they are not oathable or legally competent to testify. Infamous persons were not competent witnesses, at common law and all persons who did not regard the binding effect of an oath, such as persons who were convicted of dissolute, immoral lives, could not take an oath, in court.[2] In most countries, a general reputation for lack of chastity, in male or female, affects the competency of the witness for credibility, but not otherwise. However, Timon tells these infamous women what the law was correctly, for their lives were so notorious that their oaths would not have been received in a court of justice.

---

to the arbitrary exercise of legal authority in taxation and similar exactions; the laws, though they restrain and punish petty thieves, like you, nevertheless, by the might that makes right, plunder without restraint." Then he adds: "I have met with no comment on the passage, and can suggest no other explanation of it, but I have little doubt that this is the meaning," and of this, it seems puerile to add, that I have reached the same conclusion.

[1] Timon of Athens, Act IV, Scene III.

[2] 1 Greenleaf Evid., 373, 374; 3 Bacon's Abr., 486, 507.

At common law, the objections to a witness were such as were absolute or such as applied only between particular persons. Of the former kinds were "an infamous person, as an usurer, or one condemned by a public judgment; a perjured person; a woman who was, or had been a common prostitute and all persons who were stigmatized by the secular laws." (IV Reeve's History Eng. Law, p. 80.)

Sec. 385. Pleading false titles.—

"*Tim.* . . . Crack the lawyers voice,
That he may never more false title plead,
Nor sound his quillets shrilly."[1]

This verse is one frequently quoted by lawyers. Pleading for one's title to property is one of the ordinary functions of the lawyer. The Poet here uses satire to show that the lawyer is accustomed to plead for false titles as well for those which are true. He asks that his voice may be cracked, so that he may be compelled to stop this practice and of sounding his "quillets shrilly."

Of course, professionally, if one has a title at all, whether it is the best title to property or not, he is entitled to have his right thereto passed on by a competent court, for until this is done, it cannot be determined what his rights in the premises were. In other words, every asserted right is entitled to a representative and the fact that a lawyer speaks in a losing cause, is not always evidence that his cause was wrong. But, of course, Timon was soured, in a measure on the world, and that is why he urged such satire against the lawyer.

Sec. 386. The scope of Justice.—

"*Alcib.* . . . Till now you have gone on and fill'd the time
With all licentious measure, making your wills
The scope of justice; till now myself and such
As slept within the shadow of your power
Have wander'd with our travers'd arms and breath'd
Our sufferance vainly."[2]

Justice has been defined as "the constant and perpetual will to render unto every man his own."[3] This generous and altruistic idea of the virtue is an essential for its

[1] Timon of Athens, Act IV, Scene III.
[2] Timon of Athens, Act V, Scene IV.
[3] Touillier, Droit, Civ. Fr. tit. prel. n. 5.

enjoyment, for otherwise, expediency too often will overcome justice and prevent its attainment. While true that the individual or general interest of mankind largely determines justice, in a given case, and the prevalent sense of justice is encumbered with the hypothesis of innate notions of the virtue generally, it is not true, in civilized states that the expedient or selfish always controls or shapes the ideas of justice which obtain, but the virtue is generally cherished from the innate love of our fellowmen, and incidentally of his rights, without which our own are liable to suffer, as our own ideals of justice propagate a disregard for this virtue. The contrast between the just and the expedient is apparent, when it exists, and the natural love of mankind for his fellows, coupled with the primal idea of self-preservation, and the necessity of recognizing justice, as the groundwork of our existence, makes the recognition of justice such a moral necessity that no society can do other than exalt the proper ideals of justice and equality, which hopes to prosper. Hence, it is that Alcibiades, in his address to the Senators, pointed out a peril at the very basis of the Government, when he called their attention to the fact that their idea of justice had been confined into altogether too narrow a limit and that the rights of others were subverted to whatever they choose to recognize, by their wills. In these observations, the Poet was striking at the foundation of society and expressed the philosophy which underlies civilization.

Sec. 387. Answering public laws.—

"*Alcib.* . . . not a man
Shall pass his quarter, or offend the stream
Of regular justice, in your city's bounds,
But shall be remedied, to your public laws,
At heaviest answer."[1]

[1] Timon of Athens, Act V, Scene V.

Alcibiades here promises that the criminal or public laws, for the redress of public wrongs within the municipality of Athens, shall be rigorously enforced. That the "stream of regular justice," shall not be interfered with, but that it shall be permitted to flow as formerly and without let or hindrance so far as he is concerned.

CHAPTER XXVIII.

"CORIOLANUS."

Sec. 388. Piercing statutes.
389. Manacles.
390. Alias.
391. Complaint.
392. Bencher.
393. Pleaders.
394. Tarpeian rock.
395. Resisting Law.
396. Process.
397. Death by the Wheel.
398. Trial by Comitia.

Sec. 388. Piercing statutes.—

"1 *Cit.* . . . repeal daily and wholesome act established against the rich; and provide more piercing statutes daily, to chain up and restrain the poor. If the wars eat us not up, they will; and there's all the love they bear us."[1]

A statute is generally defined as a law enacted by the legislative power, or a written expression of the legislative will, in the form necessary to make it the law of the state or country where it is to obtain.[2] The Poet many times speaks of "biting statutes" and "piercing statutes," showing that he had the lawyers' regard for such strict legislative provisions as made it hard upon the individual citizen, when enforced, with the Poet's sympathy for the individual in any hardship that he suffered, even though it resulted from the enforcement of the law. Speaking of the repeal of such statutes as were enacted for the benefit of the poor, the idea is that such acts were rendered nugatory by inconsistent provisions, by which an implied re-

[1] Coriolanus, Act I, Scene I.

[2] Bacon, Abr., *Statutes;* Coke, 2' Inst., 200; Bouvier's Law Dict.

peal of a previous statute may be effected.[1] The legal observations in these lines are made in strict accord with the struggle then going on, between the plebeians and the patricians, for supremacy and show an accurate knowledge, not only of the legal requirements of legislative enactments, but also of the historical facts existing at this period of the world's history.

Sec. 389. Manacles.—

"*Com.* If 'gainst yourself you be incens'd, we'll put you
(Like one that means his proper harm), in manacles."[2]

"Manacles" are hand-cuffs, or other fastenings for the hands or limbs, to shackle, confine or restrain the use of the limbs or natural powers, so that criminal or insane persons cannot escape or inflict bodily injury upon others.[3]

---

[1] 16 Pet. 342.

The Poet refers to "Biting Statutes" in 2' Henry VI. (Act IV, Scene VII.)

[2] Coriolanus, Act I, Scene IX.

[3] Webster's Dictionary.

Volumnia tells Coriolanus, in her appeal for clemency, and the safety of Rome: "*Vol.* . . . for either thou Must, as a foreign recreant, be led, with manacles, through our streets, or else triumphantly, tread upon thy country's ruin." (Act V, Scene III.)

Cleopatra thus consoles herself with her approaching death:
"*Cleo.* . . . And it is great
To do that thing that ends all other deeds;
Which shackles accidents, and bolts up change;
Which sleeps, and never palates more the dung,
The beggar's nurse and Cæsar's." (Act V, Scene II.)

Posthumus puts the ring on Imogen's finger, in Cymbeline, and tells her: "For my sake, wear this; it is a manacle of love; I'll place it upon this fairest prisoner." (Act I, Scene II.)

The Messenger said, in Cymbeline: "Knock off his manacles; bring your prisoner to the king." (Act V, Scene IV.)

Sec. 390. Alias.—

"*Men.* Why, then you should discover a brace of unmeriting, proud, violent, testy magistrates (alias fools,) as any in Rome."[1]

Alias is a Latin term, meaning "otherwise," when used in the sense in which it is here employed. It literally means, another, as it is generally used and an *alias* writ is one used after another writ has already been issued in the same cause.

Sec. 391. Complaint.—

"*Men.* I am known to be a humorous patrician, and one that loves a cup of hot wine, with not a drop af allaying Tiber in't; said to be something imperfect, in favoring the first complaint."[2]

The speaker here describes himself as a humorous patrician, who takes his drinks "straight," or without dilution, and a weakness that makes him favor the "first complaint." A complaint is the allegation, made to a proper officer, that some other person has been guilty of a designated offense, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before magistrates.[3]

One so full of sympathy for his fellow-man, that after hearing his complaint, he would be so moved as to always favor the one first heard, would be so emotional and so loyal to his first impulses, as to be more or less "imperfect," in this particular, as the Poet here intimates.

Sec. 392. Bencher.—

"*Bru.* Come, come, you are well understood to be a perfecter giber for the table, than a necessary bencher In the Capitol."[4]

---

[1] Coriolanus, Act II, Scene I.

[2] Coriolanus, Act II, Scene I.

[3] 11 Pick. (Mass.) 436.

[4] Coroilanus, Act II, Scene I.

Brutus thus charges that Menelaus was a better "after dinner speaker" than one to dispense justice in the Capitol. "Bench" is a tribunal for the administration of justice and a "Bencher" is one who occupies the bench and so dispenses justice.[1] A "Bencher" at English law, was also one who was a senior, at the Inns of Court and was accordingly entrusted with the direction or government of the Inn, with the absolute power of punishing barristers guilty of misconduct, by admonishing or rebuking them; by forbidding them to dine in the hall, or by expelling them.[2]

Sec. 393. Pleaders.—

"*Bru.* We must suggest the people, in what hatred
He still hath held them; that, to his power, he would
Have made them mules, silenc'd their pleaders, and
Disproportioned their freedoms."[3]

Brutus here threatens to incite the people by appealing to their prejudice against Coriolanus, caused by his adverse attitude and friendliness for the patricians and against the plebeians. He would tell them that he would

---

[1] Bacon, Abr., *Courts;* Viner, Abr., *Courts.*

[2] Wharton's Law Lexicon, (2 Lond. Ed.); Bouvier's Law Dictionary.

The Romans used the word *tribunalia*, to indicate the seats of the higher judges, and *sub-sella*, to refer to those of the lower judges. I Reeve's Hist. Eng. Law, 4; Spellman, Gloss. *Bancus.* The Court of Common Pleas, in England, was formerly called *Bancus*, the Bench, to distinguish it from *Bancus Regis*, the King's Bench. Viner, Abr., Courts (n. 2).

[3] Coriolanus, Act II, Scene I.

In Titus Andronicus, Saturninus is made to say:
"*Sat.* Defend the justice of my cause with arms;
And, countrymen, my loving followers,
Plead my successive title with your swords."
(Act I, Scene I.)

allow them no voice at all, in the affairs of government; would deny their authority by vote in the *comitia,* to ratify or endorse the acts of public magistrates and that he would make them mere "mules," to perform their duties of citizenship in silence, and deny them the right of their tribunes to speak for them and in their interests and behalf. Pleading is here used in the sense of making a forensic argument, for the populace, which is not its strict use in the profession.

Sec. 394. Tarpeian rock.—

"*Sic.* Therefore, lay hold of him;
Bear him to the rock Tarpeian, and from thence
Into destruction cast him."[1]

The whole of the Capitoline hill was originally called by the name of Tarpeian rock, but the term was latterly confined to a portion of the southern part of the rock, which was very precipitous. There is a legend that in the time of Romulus, a vestal virgin, named Tarpeia, the daughter of St. Tarpeius, governor of the Romans, being bribed by gold by the soldiers of the Sabines, opened a gate to the fortress, to admit the Sabine king, who with his soldiers had come to revenge the rape of the Sabine women, and Tarpeia was crushed and buried on a part of the hill, which bears her name.

The rock subsequently became used for the killing of persons condemned on the charge of aspiring to restore the monarchy, during the republic, or of treason to the State, such adjudged criminals being hurled from the rock, and the famous Manlius, the victorious defender of the capital, during the invasion of the Gauls, lost his life in this way.[2]

---

[1] Coriolanus, Act III, Scene I.

[2] Gibbon, Niebuhr, Arnold.

Sec. 395. Resisting Law.—

"*Sic.* . . . he hath resisted law,
And therefore law shall scorn him further trial
Than the severity of the public power,
Which he so sets at nought."[1]

Sicilius declares that one who has scorned the forms of law, should be dealt with in a summary manner, as an outlaw and in this instance that Coriolanus was entitled only to a trial by the *comitia,* or the vote of the people, whose power he had spurned. This verse shows the Poet's respect for law, in the abstract, as the medium through which the rights of the citizens are enjoyed. "He hath resisted law," as presented here, is a serious charge and one that the speaker believes entitles the party guilty of such offense to no legal protection. Like poor Shylock's plea, when he "stands for law," this illustrates the deep insight into the world of law, as the only correct medium through which the proper ideals of equality and justice can be attained and shows the lawyer's respect for the law, in the abstract, that ought to be better understood by all citizens.

Sec. 396. Process.—

"*Men.* One word more, one word.
This tiger-footed rage, when it shall find
The harm of unscann'd swiftness, will, too late,
Tie leaden pounds to his heels. Proceed by process;
Lest parties (as he is belov'd) break out,
And sack great Rome with Romans."[2]

Menelaus advised and counsels temperate and lawful means only to punish the accused one. Admonishes against the danger of the mob and the overthrow of law and suggests that when the law is trampled under foot in the one instance, it is likely to spread and bring a

[1] Coriolanus, Act III, Scene I.
[2] Coriolanus, Act III, Scene I.

widespread reign of lawlessness upon Rome. "Proceed by process." This is lawyer-like advice, to enjoy only the rights which the law guarantees, through the remedial procedure of the courts, which crystallized into fundamental or organic law, in this country, by our provision that no one should be denied his rights, except upon "due process of law."[1]

"Process" is a word used to convey the means of compelling a defendant to appear in court, after suing out the original writ, in a civil suit, or after indictment found, in a criminal case.[2] Coriolanus' friend advises against his arrest without process, but counsels proceeding in a lawful, orderly manner only.

Sec. 397. Death by the wheel.—

"*Cor.* Let them pull all about mine ears; present me
Death on the wheel, or at the wild horses heels;
Or pile ten hills on the Tarpeian rock,
That the precipitation might down stretch
Below the beam of sight, yet will I still
Be thus to them."[3]

---

[1] See 14th Amendment to U. S. Con.

[2] 3 Sh. Bl. Comm. 279.

Cleopatra asks Antony:

"*Cleo.* Is come from Cæsar; therefore, hear it, Antony.—
Where's Fulvia's process? Cæsar's, I would say."
(Act I, Scene I.)

Doctor Rolfe gives the definition of process, presented by Malone and taken from the Dictionary of Minsheu (1617) as follows: "The writings of our common lawyers sometimes call that the *process* by which a man is called into court and no more." (Rolfe's Antony and Cleopatra, p. 213, notes.)

The King, in Hamlet, after dispatching Rosencrantz and Gildenstern, remarks: "After the Danish sword and thy free awe, Pays homage to us, thou may'st not coldly set, Our sovereign process." (Act IV, Scene III.)

[3] Coriolanus, Act III, Scene II.

This is a defiance, on Coriolanus' part, of the attempted power of the plebeians and a challenge that he will not abide it, regardless of the consequences to himself. Such a speech is in strict accord with the stern bravery and uncompromising dignity of this proud patrician, viewed in the light of the struggle between the patricians and plebeians at this period.[1] Punishment by the "wheel" was inflicted upon a criminal who was placed on a revolving wheel and his bones were then broken, until he expired.[2] It was in vogue in ancient Rome and Coriolanus, as here quoted, was willing to suffer this torture rather than surrender his principles.

Sec. 398. Trial by Comitia.—

"*Sic.* Draw near, ye people.
Aedi. List to your tribunes; audience: Peace, I say.
Cor. First, hear me speak.
Both Tri. Well, say.—Peace, ho.
Cor. Shall I be charg'd no further than this present?
Must all determine here?
Sic. I do demand,
If you submit you to the people's voices,
Allow their officers and are content
To suffer lawful censure for such faults
As shall be prov'd upon you?
Cor. I am content.

. . . . . .

Sic. Answer to us.
Cor. Say then; 'tis true, I ought so.
Sic. We charge you, that you have contriv'd to take
From Rome, all season'd office, and to wind

[1] Gibbons' Rome; Niebuhr, Arnold.
[2] Bouvier's Law Dictionary.

Paulina refers to torture by the wheel, in Winter's Tale, when she asks Leontes:
"*Paul.* What studied torments, tyrant, hast for me?
What wheels? racks? fires? etc." (Act III, Scene II.)

Yourself into a power tyrannical;
For which, you are a traitor to the people.

. . . . . .

Sic. Mark you this, people?
Cit. To the rock with him; to the rock with him."[1]

The Poet here gives the real significance to the semi-historical traditions obtaining some 500 years B. C. when Caius Marcus, surnamed *Coriolanus,* struggled to prevent the poor plebeian from being placed upon an equal footing, in the affairs of government, with the rich patrician.

The plebeian soldiers, after their victory over the Volscians, had threatened to form a rival city, unless their right of voting in such trials was recognized, and thus the *comitia tribuna,* a sort of rival power in the affairs of the government, to the *consulate* of the patricians, was recognized. The comitia was the regularly convened meeting of the Roman people, for the purpose of voting on some public question. The different departments of government, now recognized, were not separated at this period of the world's history; it was a fundamental principle of Roman Government that the supreme power was inherent in the people, though it might be delegated by them to elected or hereditary magistrates. All important matters, however, had to be brought before the sovereign people, who could ratify or reject, the proposals made to them, without a discussion. The power of the people, swayed, as they were by improper appeals and motives, led, ultimately, to a period of moral and political corruption, which was followed by the military despotism of the Cæsars. And although the first few emperors called the people together, in pursuance to this former custom of the republic, the meetings were only to ratify the acts of the emperors, and finally the power of the *comitia,* which the Poet presents as condemning Coriolanus to

[1] Coriolanus, Act III, Scene II.

banishment, became an institution known only to the traditions of the past greatness of the eternal city.[1]

[1] See Gibbon, Niebuhr, Arnold.

As this trial by the *comitia*, is presented, Shakespeare makes Coriolanus defy the power of the people, as follows: "*Cor.* I'll know no further: Let them pronounce the steep Tarpeian death, vagabond exile, flaying," etc., and to this defiance, Sicinius, appeals to the people: "*Sic.* . . . In the name o' the people, And in the power of us the tribunes, we, even from this instant, banish him our city; In peril of precipitation from off the rock Tarpeian, never more to enter our Roman gates; I' the people's name, I say, it shall be so." And the people ratify this judgment, as follows: "*Cit.* It shall be so; it shall be so; let him away; he's banish'd, and so it shall be." (Coriolanus, Act III, Scene III.)

CHAPTER XXIX.

"JULIUS CÆSAR."

Sec. 399. English statutes of "Laborers and Mechanics."
400. Idealism the basis of Brutus' crime.
401. Cassius the typical criminal revolutionist.
402. Cassius' suggestion of the crime.
403. Brutus' struggle with his conscience.
404. The people's cause, the motive for Brutus' murder.
405. "The Law of children."
406. "The King can do no wrong."
407. Cæsar's will.
408. The effect of error.
409. Antony's tribute to Brutus' character.

Sec. 399. English statutes of laborers and mechanics.—

"*Flavius.* Hence! home, you idle creatures, get you home.
Is this a holiday? What: know you not,
Being mechanical, you ought not walk
Upon a labouring day without the sign
Of your profession?"[1]

The regulation of the rights of laborers, mechanics and artisans was a frequent source of legislation in England, at an early day. During the reign of Edward III, because of the scarcity of mechanics and laborers, they took occasion to demand exorbitant wages and refused to work unless they received wages commensurate with their ideas of the value of their services. It became necessary to reduce them to subordination, as the nobility supposed, so various statutes were enacted with this end in view.

By statute, 23 Edw. III, c. 2, every able-bodied male or female, without land and able to work, was required to work at the wages customary, the six preceding years of the king's reign; they were required to bring their implements of trade into town and there be hired at a common, public

[1] Julius Cæsar, Act I. Scene I.

place; any workman or artisan failing to comply with the act, was to be punished by imprisonment, and the justices for the execution of the act were to hold sessions four times a year, at the Annunciation, on St. Margaret, St. Michael and St. Nicholas's day; they were required to regulate the conduct of laborers, and artisans and laborers, or mechanics, absenting themselves before the termination of their contract, were to be branded on the forehead with a red hot iron, containing the letter "F," to denote their *falsity*.[1] By statute during the reign of Richard II, (12 Richard II, c. 6) it was ordained that no servant, laborer nor artificer should carry a sword or buckler, except in time of war, or when traveling with their masters, but they were allowed bows and arrows and such other small trifles, on Sundays and public holidays.[2] By 13 Richard II, c. 8, the justices at their sessions between Easter and St. Michael were to make proclamation of how many and what kind of victuals all masons, carpenters, tilers and others craftsmen should take by the day,[3] and by 7 Henry IV, c. 17, it was provided that, whereas, "for the pride of clothing and other evil customs that servants do use in the same," the crafts in cities and buroughs had become depleted and laborers of this class most scarce, the act proceeded to remedy this evil, resulting from "the pride of clothing," etc.[4] It was no doubt to some of these English acts that the Poet refers in the above lines, for he always gave the foreign countries of which he wrote, the laws and manners and customs of England.

Sec. 400. Idealism the basis of Brutus' crime.—

"*Bru.* . . . But wherefore do you hold me here so long?
What is it that you would impart to me?

[1] III Reeve's History Eng. Law, pp. 132, 133.
[2] III Reeve's History Eng. Law, 366, 367.
[3] *Ante idem.*
[4] III Reeve's History Eng. Law, pp. 413, 414.

If it be aught toward the general good,
Set honour in one eye, and death i' the other,
And I will look on both indifferently:
For, let the gods so speed me, as I love
The name of honour more than I fear death."[1]

In analyzing the motives which led Brutus to murder his friend, the expert criminologist, August Goll, observes: "This is precisely the nature of the pronounced theorist. His train of ideas amounts almost to a rubric. He cannot concur in anything, unless it is founded on a theory, a principle, a syllogism. . . . From the moment the voice of his feelings seems to him to be prompted by his reason, his freedom of action is practically at an end. Without this theory he can do nothing, with it he can do all. Once formed, he must follow it and take the consequences of it. It becomes the highest moral duty to himself. No consideration of wife, friends, his own welfare, can shake him a hair's breadth from the responsibility, the duty, which his theory lays upon him, which appears to have become one, with his innermost ethical self. If the theory lead him to outrage all human feelings, so much the more it is his duty to follow it and to conquer sentiment. That is what his honour demands; and—'I love the name of honour more than I fear death.'

On no account must one think that Brutus's feeling of gratitude and friendship for Cæsar must have been false and insincere, or that they were not deep, because he can find it in his heart to kill him. . . . The greater we picture to ourselves Brutus's love of and gratitude to Cæsar, the greater he himself is, because his altruism has had the more to conquer, and the nearer he attains to the absolutely heroic."[2]

[1] Julius Cæsar, Act I, Scene II.

[2] Goll's Criminal Types in Shakespeare, pp. 54, 55, 57.

Goll points out that Brutus will not even desert his ideals, after the misfortunes of his private life and the strokes of adversity have blasted all his hopes, for "in purity of thought he is the

Sec. 401. Cassius the typical criminal revolutionist.—

"*Cas.* . . . I cannot tell what you and other men
Think of this life; but, for my single self,
I had as lief not be, as live to be
In awe of such a thing as I myself.
I was born free as Cæsar; so were you:
We both have fed as well; and we can both
Endure the winter's cold as well as he."[1]

This portrayal of Cassius, shows the envy and hatred of the typical criminal revolutionist, who cannot brook the sight of one grown greater than himself. Considering the criminal character of this conspirator, as presented by the Poet, Goll said: "Cassius, with his mixture of polit-

---

same: he carries the banner of the ideal as high as ever. He belongs to those whom adversity does not make smaller, nor experience more clever. He has learned nothing from his earlier errors, because they were the outcome of his innermost nature, not of insufficint knowledge." (Goll's Criminal Types in Shakespeare, p. 70.)

Illustrating the high ideals of Brutus, where the public interest was in issue, Plutarch describes how he had taken sides with Pompey, as against Cæsar, although his father had been put to death by Pompey. He said: "Thinking it his duty to prefer the interest of the public to his own private feelings, and judging Pompey's to be the better cause, he took part with him; though formerly he used not so much as to salute or take any notice of Pompey, if he happened to meet him, esteeming it a pollution to have the least conversation with the murderer of his father." (Plutarch's Life of Marcus Brutus.)

And referring to the object of the conspirators in urging Brutus to take part with them, Plutarch said: "Their opinion was that the enterprise wanted not hands or resolution, but the reputation and authority of a man such as he was, to give, as it were, the first religious sanction, and by his presence, if by nothing else, to justify the undertaking; that without him they should go about this action with less heart and should lie under great suspicions when they had done it, for, if their cause had been just and honorable, people would be sure that Brutus would not have refused it." (Plutarch's Life of Marcus Brutus.)

[1] Julius Cæsar, Act I, Scene II.

ical and personal hatred, with his power to let the one strengthen the other, is the type of one of the groups of which the adherents of revolution consists, the great haters, those who, as Auguste Comte says, about the followers of the great French Revolution, are perpetually in a condition of 'chronic rage' which enables them, whenever they consider the right moment has come, to perform the most horrible actions—the men of whom the anarchists of the present time, are the lineal descendants. Cassius possesses the energy proper to this hatred, to gather, lead, and agitate, to compel the others to follow. Always active, reconnoitering, intriguing, enlisting followers, considering chances, quick of mind and subtle of reason, he disports himself like a fish in water at nightly conferences, at solemn meetings; caring nothing about thunderstorms and warnings, never losing sight of his aim, always working to gain ground, always discerning where something may be won, what is worth troubling about, where the chances lie."[1]

Sec. 402. Cassius' suggestion of the crime.—

"*Cas.* Why man, he doth bestride the narrow world,
Like a Colossus; and we petty men
Walk under his huge legs, and peep about
To find ourselves dishonourable graves.
Men at some time are masters of their fates:
The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings.

. . . . . .

There was a Brutus once, that would have brook'd
The eternal devil to keep his state in Rome,
As easily as a king.

[1] Goll's Criminal Type sin Shakespeare, pp. 43, 44.

And it is this very characteristic, noted by this criminologist, that the Poet makes Cæsar also note, when he said to Antony: "Yond Cassius has a lean and hungry look; He thinks too much: such men are dangerous." And history affords evidence that this remark was really made of this criminal revolutionist by the discerning Cæsar. (Plutarch's Life of Marcus Brutus.)

Bru. That you do love me, I am nothing jealous;
What you would work me to, I have some aim;
How I have thought of this, and of these times,
I shall recount hereafter; for this present,
I would not, so with love I might entreat you,
Be any further mov'd. What you have said,
I will consider; what you have to say,
I will with patience hear: and find a time
Both meet to hear, and answer, such high things."[1]

Cassius' appeal to Brutus, as the descendant of Lucius Junius Brutus, who it is suggested, would never have brook'd a king in Rome, is presented as the suggestion that puts the mind of Brutus in a proper frame to afterward accept the crime as the only logical remedy for the evils that he must free the people from. Cassius knew that Brutus would be moved alone by his sense of duty to the people, hence he presents the duty, which he must not shirk. Brutus is already troubled as to how he ought to act, under all the circumstances and Cassius suggests that he ought to act in this way, i. e., he ought to rid the people of this ambitious man. It is as if a light plainly led him now, in this direction and this suggestion furnishes the inducement that was needed to resolve his indecision. Cassius' words have had the desired effect for

"Brutus had rather be a villager
Than to repute himself a son of Rome
Under these hard conditions as this time
Is like to lay upon us."

But Brutus is not a man of impulse or sentiment and will not be driven to the commission of the crime by the mere force of suggestion from another. He will weigh the evidence and himself determine upon the proper course to pursue, with regard solely to his fixed duty to the public. He would not, at present, "be any further mov'd," but he "will consider" all that Cassius has had to say.

[1] Julius Cæsar, Act I, Scene II.

He will not consent to the commission of the crime, until he has had ample time for reflection and to harmonize the deed with his sense of duty and his high ideals. But of course the seed is sown and the suggestions made by Cassius will bring his reason into line with the suggestions of the criminal revolutionist.

Sec. 403. Brutus' struggle with his conscience.—

"*Bru.* Since Cassius first did whet me against Cæsar,
I have not slept.
Between the acting of a dreadful thing
And the first motion, all the interim is
Like a phantasma, or a hideous dream:
The genius, and the mortal instruments,
Are then in council; and the state of man,
Like to a little kingdom, suffers then
The nature of an insurrection."[1]

True to the character of this high-minded theorist, Shakespeare makes of Brutus the man of conscience, who must first reason the thing out for himself and become convinced that right is on his side, before he can commit himself to the commission of the deed. He was no man of impulse, with a personal hatred or grievance to gratify in this murder, who surrendered himself, on the first suggestion of the deed; but he had to first bring his reason and his proper idea of the deed to correspond with his theories before he would consent to proceed in the enterprise. He had to overcome not only his own conscientious scruples against such a deed, but also his personal friendship and love for Cæsar and his horror for such a cowardly deed, for Brutus was a man of brave deeds. Opposed to these motives, which impelled him in the opposite direction, he had to consider the interests of the people and the danger resulting to their cause, from the crowning of a king in Rome. With these conflicting impulses and the struggle with his conscience, Brutus had

[1] Julius Cæsar, Act II, Scene I.

not slept, "since Cassius first did whet" him against Cæsar; ever since the suggestion of the crime he had been like a visionary, or one experiencing "a hideous dream." And "like to a little kingdom," he had suffered "the nature of an insurrection."

Sec. 404. The people's cause the motive for Brutus' murder.—

"*Bru.* No, not an oath: If not the face of men
The sufferance of our souls, the time's abuse,—
If these be motives weak, break off betimes,

Plutarch mentions the high ideals of Brutus for law and his duty, as he saw it, by pointing out that on one occasion, when he was Praetor, and had patiently and laboriously heard the evidence and given judgment in a cause and the party against whom his decision was rendered, raised a great clamor and appealed to Cæsar, Brutus calmly replied that "Cæsar does not hinder me, nor will he hinder me, from doing according to the laws." (Plutarch's Life of Marcus Brutus.)

It was no doubt this stern adherence to duty and law, as he saw it, that led this upright citizen into the commission of the murder of his friend and protector, the great Cæsar.

Judged by strictly legal standards, of course the offense is none the less murder, because the life of a human being was taken in an illegal manner, by an upright citizen, or one possessed of the best motives. Every illegal killing of a human being, is murder or manslaughter, according to the circumstances of the killing and this violation of the law, by taking the life of a human being, on grounds of public policy, could not be the subject of explanation, as a lawful defense of the killing, but it could only be held murder to take the life of a human being, in an unlawful manner, or otherwise the lives of persons would have little or no protection by the law, but the better the citizenship or motives of the wrongdoer, the less chance there would be to secure convictions for such crimes. Brutus was therefore, in the legal view, a murderer, because he conspired to take the life of a human being, in an illegal manner, but nevertheless, in studying the character of the man, and analyzing his motives, it is proper to compare him with the other criminals who entered into the conspiracy for less noble motives than those which prompted him to act.

And every man hence to his idle bed;
So let high-sighted tyranny range on,
Till each man drop by lottery. But if these,
As I am sure they do, bear fire enough
To kindle cowards, and to steel with valour
The melting spirits of women; then, countrymen,
What need we any spur, but our own cause,
To prick us to redress? what other bond,
Than secret Romans, that have spoke the word,
And will not palter? and what other oath,
Than honesty to honesty engag'd,
That this shall be, or we will fall for it?
Swear priests, and cowards, and men cautelous,
Old feeble carrions, and such suffering souls
That welcome wrongs; unto bad causes swear
Such creatures as men doubt: but do not stain
The even virtue of our enterprise,
Nor the insuppressive mettle of our spirits,
To think, that, or our cause, or our performance,
Did need an oath."[1]

Brutus is here presented as a criminal or conspirator who will not act upon either sentiment or impulse, but is swayed to the commission of his crime by the highest sense of his duty to further the cause of the people of Rome. Dante wrongfully assigns to Brutus a place in hell alongside the traitor Judas. As he himself explained to the people of Rome it was "not that I loved Cæsar less, but that I loved Rome more." He sacrificed his love for Cæsar for the sake of the people's cause, as he viewed it and it was not that his love for Cæsar was small, in proportion to the sense of his duty, toward the people, but that this all impelling sense of duty was so great as to overcome his own personal regard for Cæsar. Of course, from a strictly legal standpoint, it does not mitigate the crime, that the criminal was prompted to commit the offense by the strictest sense of duty,[2] but in analyzing the

[1] Julius Cæsar, Act II, Scene I.

[2] In the trial of the fanatic Guiteau, for the murder of President Garfield, the defense was urged that the murderer was impelled to commit the crime while acting under the hallucination of a

motives of the criminal, the same degree of moral turpitude cannot attach to one who acts from a high sense of duty, rather than the base motives that usually prompt such crimes. Contrasted with the envy and personal hatred which prompted Cassius to murder Cæsar, the altruistic feelings and motives that led Brutus to subordinate his personal interests and love for Cæsar to his high public duty, makes the ethical mastery that he gained over himself the more complete.

The moving force that impelled him to the commission of the crime was that "high-sighted tyranny" should not "range on." With this high sense of his personal duty, he did not regard the enterprise as a "bad cause" and so entreated his accomplices not to "stain the even virtue" of the enterprise, "nor the insuppressive mettle" of their spirits by an ignoble oath.

Divine command, but it was held to be incompetent to thus overcome the guilty intent to commit the crime of murder and that such a defense was unavailing.

In refusing the suggestion that Antony should also be killed, Brutus tells Cassius:

"*Bru.* Let us be sacrificers, but no butchers, Caius.
We all stand up against the spirit of Cæsar;
And in the spirit of men there is no blood:
O, that we then could come by Cæsar's spirit,
And not dismember Cæsar: But, alas,
Cæsar must bleed for it, And, gentle friends,
Lets kill him boldly, but not wrathfully;
Let's carve him as a dish fit for the gods,
Not hew him as a carcase fit for hounds." (Act II, Scene I.)

In his address to the Romans, after the murder of Cæsar, Brutus avowed his love for Cæsar, in the following words: "*Bru.* If there be any in this assembly, any dear friend of Cæsar's, to him I say, that Brutus' love to Cæsar was no less than his. If then that friend demand, why Brutus rose against Cæsar, this is my answer,—Not that I loved Cæsar less, but that I loved Rome more. Had you rather Cæsar were living, and die all slaves: than that Cæsar were dead, to live all free men? As Cæsar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I

Sec. 405. "The law of children."—

"*Cæsar.* I must prevent thee, Cimber,
These couchings and these lowly courtesies
Might fire the blood of ordinary men,
And turn pre-ordinance and first decree
Into the law of children."[1]

The Poet intends to make great Cæsar "stand for law" and not for the fickle, vacilating law of children, which would be shaped and formed by the emotions and childish fancies, but the fixed, steady law of strong men. Cæsar was like the "northern star" in his fixedness and true "resting quality," while his lesser fellows did not possess these elements of greatness. In other words, he had pronounced judgment in the case of Cimber's brother and unless he could be shown that this judgment was wrong, he could not be influenced by his emotions or the appeals of the influential, to set aside his former judgment, for this would make the law of Cæsar a thing of ridicule, and reduce his fixed, constant decrees to the plane of childish law.[2]

---

honour him: but, as he was ambitious, I slew him." (Act III, Scene II.)

Illustrating the high regard of the ancient Romans for law and order, Plutarch shows how Augustus Cæsar, on his accession, to the consulship, "immediately ordered a judicial process to be issued out against Brutus and his accomplices, for having murdered a principal man of the city, holding the highest magistracies of Rome, without being heard or condemned; and he appointed Lucius Cornificus to accuse Brutus and Marcus Agrippa to accuse Cassius. None appearing to the accusation, the judges were forced to pass sentence and condemn them both. It is reported, that when the crier from the tribunal, as the custom was, with a loud voice cried Brutus to appear, the people groaned audibly, and the noble citizens hung down their heads for grief." (Plutarch's Life of Marcus Brutus.)

[1] Julius Cæsar, Act III, Scene I.

[2] It is barely possible that the Poet, in these lines, wherein he refers to the "law of children," meant the old law of England by which the lord of the manor was given the right to exact a fine

Sec. 406. "The king can do no wrong."—

"*Cæsar.* Know Cæsar doth not wrong, nor without cause
Will he be satisfied."[1]

The Poet in these lines puts into the mouth of Cæsar the common law of England, by which it was held that the "king could do no wrong." It was a necessary and fundamental principle of the English Constitution that the king "could do no wrong." Whatever was amiss in the conduct of public affairs could not be charged personally to the king; his ministers alone were accountable for wrongs done to the people; the prerogative of the crown extended to doing only good, for as the king reigned for the benefit of the people it was not possible for him to do wrong.[2] The law supposed an entire absence of capacity to do wrong, because of the excellency of the king's person and the perfection of his virtues; he was presumed incapable of committing folly, much less of committing crimes, hence was not under the coercive power of the law, whose province was the redress of wrongs.[3] Cæsar occupied the analogous position of king, or Imperator of the Romans, hence Shakespeare endows him with the attributes of royalty, enjoyed by English kings, before the law.

Sec. 407. Caesar's will.—

"*Ant.* . . . But here's a parchment, with the seal of Cæsar,
I found it in his closet, 'tis his will:
Let but the commons hear this testament,
(Which, pardon me, I do not mean to read,)
And they would go and kiss dead Cæsar's wounds,

---

for every child begotten by his bond-women, without his own consent. Every reputed father of a bastard was required to pay a small fine to the Lord and for this trivial offering the law was overlooked, on the part of the lord of the manor. (Cowel.)

[1] Julius Cæsar, Act III, Scene I.

[2] III Shars. Bl. Comm., sec. 255, p. 173; IV *idem.*, sec 33, p. 351.

[3] IV Shars. Bl. Comm., sec. 33, pp. 351, 30.

And dip their napkins in his sacred blood;
Yea, beg a hair of him for memory,
And, dying, mention it within their wills,
Bequeathing it, as a rich legacy,
Unto their issue.

. . . . . .

Here is the will, and under Cæsar's seal.
To every Roman citizen he gives,
To every several man, seventy-five drachmas.

. . . . . .

Moreover, he hath left you all his walks,
His private arbours, and new-planted orchards,
On this side Tyber; he hath left them you,
And to your heirs forever; common pleasures,
To walk abroad, and recreate yourselves."[1]

The Poet gives no undue prominence to the fact that Cæsar's will contained his seal, for both by the common law and law of ancient Rome, such documents were required to be under seal. Indeed, at any early period, seals were given much more prominence in legal documents, such as wills, than at the present day, and all prominent individuals had their impressions made on wax, or other soft substance, with a die, or matrix, or a gem, which was used as their private seals. Sealed rings were in use, in Egypt, at an early day, by which such documents were sealed, and a variety of devices were in use in Rome, both by the earlier emperors and by private individuals.[2]

As history quotes the will of Cæsar, he left a substantial legacy to each one of the Roman citizens, but the bulk of his estate was left to the son of his niece, afterwards known as Augustus Cæsar. Antony acted as executor of this will, until young Cæsar was unable to compel him to carry out the terms of the will and enforce the will of the testator, then he sought advice from Cicero, to compel Antony to carry out the terms of the will.[3]

[1] Julius Cæsar, Act III, Scene II.

[2] Gibbon's Rome.

[3] Plutarch's Life of Cæsar and Plutarch's Life of Antony.

Sec. 408. The effect of error.—

"*Mes.* . . . O hateful error, melancholy's child:
Why dost thou show to the apt thoughts of men,
The things that are not? O error, soon conceiv'd,
Thou never com'st unto a happy birth,
But kill'st the mother that engender'd thee."[1]

While this verse is not strictly applicable to legal error, any more than to any other kind of error, the remarks of Messala, on discovering that Cassius had yielded to error, are appropriate, in commenting upon any error, whereby a wrong results. Lawyers have especially to deal with the errors of the courts and "alleged errors," when, in fact none exist and as the modern practice is said to be, in some quarters, but a "quest for error," this description of the blighting effect of error, as a child of "melancholy," ought to make both courts and lawyers slow to fall into error, or to lead another into error.

Sec. 409. Antony's tribute to Brutus' character.—

"*Ant.* This was the noblest Roman of them all:
All the conspirators, save only he,
Did that they did, in envy of great Cæsar;
He, only, in a general honest thought,
And common good to all, made one of them.
His life was gentle; and the elements
So mix'd in him, that Nature might stand up,
And say to all the world, *This was a man.*"[1]

Brutus, as August Goll, the criminologist, shows, is but a murderer, when judged both by legal and worldly stand-

---

Referring to the terms of this will, Plutarch said that "it appearing by the will that Cæsar had bequeathed to the Roman people seventy-five drachmas a man, and given to the public his gardens beyond Tiber (where now the temple of Fortune stands), the whole city was fired with a wonderful affection for him, and a passionate sense of the loss of him." (Plutarch's Life of Marcus Brutus.)

[1] Julius Cæsar, Act V, Scene III.
[2] Julius Cæsar, Act V, Scene V.

ards, for the spotlessness of his motives, or the high ideals which he sought to attain, cannot take away or destroy his guilt. On the grounds of public necessity, crime cannot be forgiven, by any explanation of a lack of criminal intent to commit an admitted criminal act. By this standard, Brutus is a condemned murderer and no high aims of the man can palliate his crime. But the Poet has evidently not overlooked the man in the deed and he prefers to judge him, with his deep sympathy and generosity, according to the weakness of the race, by his exalted objects and spotless intentions. He will not let history write the last word, but puts words into Antony's mouth to mollify the harsh judgment of the law, upon his deed. Antony, as Shakespeare makes him speak, shows that this man was prompted solely by the general good and by no personal hostility or envy. He, alone, sought an ideal; he attempted to be more than a man, and to judge and avenge the wrongs of the greatest of the sons of men. In this he failed, because he was, at best, but "a man." But his purity of life, his honest impulses, his freedom from criminal instinct, can but commend the character of the man, to even the hardest judges of his crime, for while admitting his guilt, this epitaph of Antony, that "He only, in a general honest thought and common good to all, made one of them," distinguishes him from the guilty and envious conspirators who participated in this interesting world's drama.[1]

[1] This is the conclusion of August Goll. See Goll's Criminal Types in Shakespeare, pp. 74, 75, 76, 77.

CHAPTER XXX.

"ANTONY AND CLEOPATRA."

Sec. 410. Bourn.
411. Leaving property in use.
412. Title by descent and purchase, distinguished.
413. Prorogue.
414. Malefactor.
415. Antony's suicide—*Felo de se.*

Sec. 410. Bourn.—

"*Ant.* There's beggary in the love that can be reckon'd.
Cleo. I'll set a bourn how far to be belov'd.
Ant. Then must thou needs find out new heaven, new earth."[1]

Bourn means a boundary or limitation.[2] Antony tells Cleopatra that a love without limit or boundary is the only kind of love for him. She asserts that there is a limitation or natural boundary line to her love, and he replies that she must necessarily find a proper limit to heaven and earth to do so, meaning that their love is as broad and limitless as the earth and the heavens.

Sec. 411. Leaving property in use.—

"*Antony.* Hear me, queen.
The strong necessity of time commands
Our services awhile, but my full heart
Remains in use with you."[3]

A "use," by the English law, was a confidence reposed in another, who was made tenant of the land, or *terre*

[1] Antony and Cleopatra, Act I, Scene I.

[2] Bouvier's Law Dictionary.

In his soliloquy, Hamlet speaks of the "undiscover'd country from whose bourn no traveler returns." (Hamlet, Prince of Denmark, Act III, Scene I.)

[3] Antony and Cleopatra, Act I, Scene III.

tenant, that he would retain and use and finally dispose of the land according to the intention of the *cestui que use,* or him to whose use it was granted, and suffer him to take the profits.[1] Uses were derived from the *fidei commissa* of the Roman law, and it was the duty of the Roman magistrate, the praetor, to enforce the observance of this confidence.[2] This being the source of the English "use" it is quite proper for the Poet to make Antony use this legal term in advising her that he left his heart with her, in his absence.

Sec. 412. Title by descent and purchase distinguished.—

"*Lep.* . . . His faults, in him, seem as the spots of heaven,
More fiery by night's blackness; hereditary,
Rather than purchas'd; what he cannot change,
Than what he chooses."[3]

This verse distinguishes, clearly, between the title by descent and that by purchase, as it is known at law.

In the law of real property, a title by descent, is a hereditary title, descending to an heir by operation of law, with which he has nothing to do as the acquisition of such title is involuntary, on his part.[4] A title by purchase is one derived by bargain and sale, from the owner, hence, it is one voluntarily selected by the buyer or purchaser.[5]

Lepidus, out of charity for Antony, refers to his faults as mere "spots of heaven;" as hereditary, rather than purchased; "what he cannot change, than what he chooses." In this last analysis, he distinguishes, as any lawyer might properly do, between things acquired by operation of law,

---

[1] Plowd. 352; Bacon, Law Tr., 150, 306; Coke, Litt. 272b; 2 Bl. Comm. 328.

[2] Bacon's Inst., 2, 23-2; 2 Bl. Comm. 333; Bacon, Law Tr. 335.

[3] Antony and Cleopatra, Act I, Scene IV.

[4] Tiedeman's Real Prop. (3d ed.), Chap. *Title by descent.*

[5] Tiedeman's Real Prop. (3d ed.), Chap. *Title by Purchase.*

in which the will of the possessor has nothing to do—and the law of nature is liken'd to the law of man—and the things voluntarily taken, by one's own choosing, as a title by purchase. It is a lawyer's excuse for one's natural weaknesses.

Sec. 413. Prorogue.—

"*Pom.* . . . Epicurean cooks,
Sharpen with cloyless sauce his appetite;
That sleep and feeding may prorogue his honor,
Even till a Lethed dullness."[1]

Prorogue means to defer or postpone, as a term of Parliament is said to be prorogued, or prolonged. Prorogue is sometimes used as a synonym for adjournment, when a trial is said to be prorogued, or a term of court is said to be prorogued, or adjourned.[2]

Pompey would have the good things enjoyed by Antony, in Egypt, so dull his honor that it would be prolonged and put off, that his joinder in the war might be too late to avail his allies and thus Pompey would reap the benefit of his absence.

Sec. 414. Malefactor.—

"*Cleo.* I do not like, *but yet,* it does allay
The good precedence; fie upon *but yet;*
But yet is a gaoler to bring forth
Some monstrous malefactor."[3]

Malefactor is a common legal term for a wrongdoer, or a violator of the law, and especially of the criminal law.[4]

Cleopatra, out of her suspicion, or intuition, foresees the dark object concealed by the messenger and with a

[1] Antony and Cleopatra, Act II, Scene I.
[2] Tomlin's Law Dictionary.
[3] Antony and Cleopatra, Act II, Scene V.
[4] Bouvier's Law Dictionary.

foreboding of the evil to come, looks upon the words used by the messenger as the accompaniment of some direful news, which the Poet compares to prisoners, ushered in by a jailor.

Sec. 415. Antony's suicide—felo de se.—

"*Der.* He is dead, Cæsar;
Not by a public minister of justice,
Nor by a hired knife; but that self hand,
Which writ his honor in the acts it did,
Hath, with the courage which the heart did lend it,
Splitted the heart."[1]

The Poet here distinguishes accurately between suicide or *felo de se,* and death in a legal manner, or by a minister of justice.

It was a crime, in England to kill one's self and an accessory to such a crime was guilty of murder.[2] And the crime did not only extend to one wilfully killing himself, but if one intended to kill another and killed himself, the crime was the same, by the English law. The punishment inflicted on a suicide, consisted, formerly in an ignominious burial, in the highway with a stake driven through the body, and without Christian rites, and the goods and chattels of the suicide were forfeited to the crown.[3]

---

[1] Antony and Cleopatra, Act V, Scene I.

[2] II Reeve's History Eng. Law, 275.

[3] II Reeve's History Eng. Law, 275.

The English Act of 1824 permitted burial in the churchyard of the suicide, without rites, between 9 and 12 p. m., but by the Act of 1882, burial at any hour, with the usual rites, were sanctioned.

As a person committed felony in killing another, so, in law, he was held equally guilty in laying violent hands upon himself and this was called *felonia de seipso.* And Bracton shows that a man who killed himself forfeited his movables. Bract. 150.

Imogen, in speaking of self-slaughter, is made to say, in Cymbeline:

"*Imo.* Against self-slaughter
There is a prohibition so divine
That cravens my weak hand." (Act III, Scene IV.)

In pronouncing the funeral oration, at the grave of Ophelia, the Priest, in Hamlet, refers to the fact that

"Her death was doubtful;
And, but that great command oe'rsways the order,
She should in ground unsanctified have lodg'd,
Till the last trumpet." (Act V, Scene I.)

Touching suicide, Hamlet is made to say:

"*Ham.* O, that this too too solid flesh would melt,
Thaw, and resolve itself into a dew:
Or, that the Everlasting had not fix'd
His canon 'gainst self-slaughter." (Act I, Scene II.)

CHAPTER XXXI.

"CYMBELINE."

Sec. 416. Election to act in given way.
417. Advocate.
418. Condition of wager contract.
419. Lawyer's duty to understand case.
420. Witness to action.
421. Forfeiters.
422. Frankleyn.
423. Debtor overpassing bound.
424. Demesne lands.
425. Guiderius' defense of his crime.
426. Upright Justicer.

Sec. 416. Election to act in given way.—

"1 *Gent.* . . . her own price
Proclaims how she esteem'd him and his virtue;
By her election may be truly read,
What kind of man he is."[1]

Election, in the law, is the choice between alternating or inconsistent rights or claims.[2] The right may arise, either under contract or independently of contract, as where one has the right, in case of loss, either to pay a certain sum, or rebuild the property destroyed, the decision of which course would be pursued, would be called making one's election. This right is of especial importance in equity practice, where constantly recurring instances are arising of the assertion of the right.

In the sense in which the term is used here, it is rather

[1] Cymbeline, Act I, Scene I.

[2] Bouvier's Law Dictionary.

In this same play, a Lord is made to say: "2 *Lord.* If it be a sin to make a true election, she is damned." (Act I, Scene III.)

to indicate the choice or selection of a particular person, over another, than one of two inconsistent rights or remedies.

Sec. 417. Advocate.

"*Queen.* . . . For you, Posthumus,
So soon as I can win the offended king,
I will be known your advocate."[1]

An advocate is generally defined as the "patron of a cause," and in Rome, those who assisted their clients with advice and pleaded their cause in the time of the Republic, were called by that name.[2] The advocate, in Rome, conducted the cause in public, and was assisted by the procurator or attorney, who looked up the evidence and assisted the advocate.[3]

The Queen, therefore, rightly selected the broader term, in promising to assist Posthumus in his suit for the hand of Imogen.

Sec. 418. Conditions of wager contract.—

"*Iach.* By the gods, it is one:—If I bring you no sufficient testimony that I have enjoyed the dearest bodily part of your mistress, my ten thousand ducats are yours; so is your diamond, too. If I come off and leave her in such honour as you have trust in, she your jewel, this your jewel, and my gold are yours. . . .

Post. I embrace these conditions; let us have articles betwixt us. . . .

Iach. Your hand; a covenant: We will have these things set down by lawful counsel, and straight away for Britain; lest the bargain should catch cold and starve: I will fetch my gold and have our two wagers recorded.

---

[1] Cymbeline, Act I, Scene II.

[2] Bouvier's Law Dictionary.

[3] Ulpian, Dig. 50, tit. 13; Tacitus, Annal. X. 6.

Post. Agreed.
French. Will this hold, think you?"[1]

A condition is a limitation or restriction placed in a written agreement upon the performance of which an estate, interest or right becomes fixed or vested, but on the non-performance of which the estate determines.[2] A condition necessarily refers to a future event or contingency, and not to a present or past event. Conditions are either expressed or implied, and by the express terms of this contract of wager, the gold of Iachimo was to be transferred to Posthumus, if he did not succeed in his attempt upon the chastity of Imogen, while Posthumus' ring was to be his, if he succeeded in seducing her. Iachimo, after Posthumus agrees to the conditions of the wager, demands that covenants be entered into, for the performance of the contract, and suggests that these things "should be set down, by lawful counsel," "lest the bargain should catch cold and starve." By this latter expression, he means that if the contract is not reduced to writing, in lawful form, the undertaking would amount to nothing, and in this he was correct, as he was in referring to the necessity of recording the wager, since the depositing of such documents in a public repository was a custom resulting from the Saxon usage continued long after the invasion of the Normans, whereby not only purchases of land, but testaments and other agreements were filed for safekeeping.[3]

The doubt, expressed by the Frenchman, as to the legal effect of this covenant, in the question: "Will this hold, think you?" is most pertinent to the subject matter of the agreement, for, of course, the undertaking upon which the condition rested, i. e., the seduction of a chaste female, is of such an illegal nature as to render the agreement

---

[1] Cymbeline, Act I, Scene V.
[2] Bouvier's Law Dictionary; Lawson, Contracts (2d ed.) 238.
[3] I Reeve's Hist. Eng. Law, p. 346.

utterly void, in law.[1] The law, in such cases, leaves the parties to illegal agreements where it finds them, refusing to interfere, either to enforce or relieve against agreements contrary to public policy.[2]

Sec. 419. Lawyer's duty to understand case.—

"*Clo.* . . . I will make
One of her women lawyer to me; for
I yet not understand the case myself."[3]

Cloten's soliloquy, wherein he reflects that gold had often sav'd the thief, whereupon he concludes to try its effect upon the women attendants upon Imogen, is a fitting application of his revery to himself, but in placing them in the category of lawyers, by inducing them to betray their clients, he mistakes the primal duty of the lawyer. Loyalty to his client is the first duty of the lawyer and this duty is rarely broken by lawyers. It is likewise the duty of the lawyer to thoroughly understand his client's case, and in this respect Cloten's conclusion is proper, for while a client may not, himself, understand his cause, his lawyer ought always to know not only the facts, but the law applicable to those facts, in his client's favor.

Sec. 420. Witness to action.—

"*Clo.* You have abus'd me:—
His meanest garment?
Imogen. Ay; I said so, sir,
If you will mak't an action, call witness to't."[4]

Cloten complains that he has been abused and Imogen, instead of withdrawing the objectionable speech, challenges him to bring his action, if he will and call his witness.

---

[1] Lawson, on Contracts, (2d ed.) Chap. *Illegal Considerations.*
[2] Lawson, Contracts, (2d ed.) *supra.*
[3] Cymbeline, Act II, Scene III.
[4] Cymbeline, Act II, Scene III.

An action is the form of a suit, for the recovery, by the law, of that which is one's due, or, in other words, it is the legal demand, according to approved proceedings, for the enforcement of the right.[1] The successful maintenance of an action, at law, depends upon the proof of the facts on which it is based and as this can only be done by witnesses, a witness is one of the main essentials to every action at law.

Sec. 421. Forfeiters.—

"*Imogen.* . . . Lovers
And men in dangerous bonds pray not alike;
Though forfeiters you cast in prison, yet
You clasp young Cupid's tables."[2]

By the Statute Merchant, of England,[3] debtors were required to enter into bond, before the mayor of London,[1] or the chief warden of other cities or towns, and the lands of the debtor were conveyed to the creditor, until out of the rents and profits his debt was paid and satisfied.[4] If the debtor forfeited his bond, he was liable to be thrown in jail, until the penalty was discharged,[5] hence he would pray to be relieved of the bond, but the lover would pray that the bonds of love might hold him forever.

---

[1] Coke's Litt. 285.

In A Lover's Complaint, the "fickle maid" on perusal of her letters, cried:

"O false blood, thou register of lies,
What unapproved witness dost thou bear:
Ink would have seem'd more black and damned here."
(52, 54.)

[2] Cymbeline, Act III, Scene II.

[3] 13 Edw. I, c. 1.

[4] 2 Bl. Comm. 160; Cruise, Dig. tit. 14, sec. 7.

[5] Bacon, Abr.

The lines just preceding those quoted above refer to the formula of sealing such bonds as were exacted of debtors, by creditors, for while sealing was required, signature was not essential to the validity of such obligations. Rolfe's Cymbeline, p. 214, notes.

Sec. 422. Frankleyn.—

"*Imogen.* Go bid my woman feign a sickness, say
She'll home to her father; and provide me presently
A riding-suit, no costlier that would fit
A franklin's housewife."[1]

A "frankleyn," at English common law, was a freeman; a freeholder, or what is equivalent to-day, with a gentleman.[2]

Imogen did not want to be dressed like a princess or attired so lowly as to cause adverse comment, but arrayed in a riding-habit such as would befit the wife of a gentleman, or land-owner.

Sec. 423. Debtor overpassing bound.—

"*Gui.* . . . A prison for a debtor, that not dares,
To stride a limit."[3]

By the English statute of Merchants, it was enacted that a creditor, if his debt was not paid, when due, might bring the debtor before the Mayor of London, or the Chief Warden of any other town, in the Kingdom, and cause him to make due acknowledgment of his debt and if it was not paid, when due, according to this acknowledgment, the creditor could have the debtor, on its production, committed to the Tower, until the debt was paid.[4] As to all such prisoners for debt, there were certain boundaries within which they were required to remain, and if the debtor went beyond these boundaries, it was equivalent to an unlawful escape and he was dealt with accordingly.[5]

Iachimo, speaking of his false enjoyment of Imogen, is made to say: ". . . . he could not but think her bond of chastity quite crack'd, I having ta'en the forfeit." (Act V, Scene V.)

[1] Cymbeline, Act III, Scene III.
[2] Bouvier's Law Dictionary; Cowel.
[3] Cymbeline, Act III, Scene III.
[4] II Bell's Com. (Shaw's Ed.), p. 1067.
[5] *Ante idem.* 3 Bl. Comm. 290.

Sec. 424. Demesne Lands.—

"*Bel.* . . . this twenty years,
This rock, and these demesnes, have been my world."[1]

Demesne originally signified that portion of the lands of a manor which the lord reserved for his own use and occupation. In this respect demesne lands differed from lands granted or subfeued to the vassals for their services. So long as the doctrine of sub-infeudation existed, demesne lands were held by a distinct and separate right. But by the statute *Quia Emptores,* (18 Edw. I) sub-infeudation was abolished; the feofee was held to take under the lord paramount, and all lands became demesne. So at the present day, demesne lands may be regarded as all lands held by the owner by virtue of his possession and title thereto.[2]

Sec. 425. Guiderius' defense of his crime.—

"*Gui.* . . . The law
Protects not us: Then why should we be tender,
To let an arrogant piece of flesh threat us;
Play judge, and executioner, all himself;
For we do fear the law?"[3]

In this verse the Poet makes the speaker defy the law, because the law had furnished no protection for him. This is the reasoning of the criminal in every instance, and because the hand of all men is against the outlaw he is, likewise, against all men and the laws of man and refuses to take refuge under an authority that will afford him no protection.

This statutes of Merchants was enacted at Acton Burnel, in 1282. Bell's Com. *supra.*

[1] Cymbeline, Act III, Scene III.

[2] Tiedeman's Real Property (3d ed.), Chapter III.

In his reference to Rosaline's bright eyes, in Romeo and Juliet, Mercutio speaks of her bodily proportions and the "demesnes that there adjacent lie." (Act II, Scene I.)

[3] Cymbeline, Act IV, Scene II.

An equally able defense of his act in killing Cloten would have been the fact that his own life was threatened by him and he fought in the defense of his person; and this would have been a defense consistent with the due enforcement and recognition of the law, rather than in defiance of the majesty of law.

Sec. 426. Upright Justicer.—

"*Post.* . . . . Ay, me, most credulous fool,
Egregious murtherer, thief, any thing
That's due to all the villains past, in being,
To come:—O, give me cord, or knife, or poison,
Some upright justicer."[1]

In old English law, a Justiciar, or Justicier, was a judge or justice, and was one of several persons, learned in the law, who sat in the *aula regis,* and formed a kind of appellate court in cases of difficulty.[2] The Chief Justiciar was a special magistrate who presided over the whole *aula regis;* he was the principal minister of state; the second man in the kingdom and by virtue of his office, the guardian of the realm in the absence of the king.[3]

Posthumus felt such guilt of conscience that he was willing to meet any doom that might be accorded him and prayed the "upright Justicer" to sentence him, either to the knife, hanging, or have him poisoned, and his guilty conscience was so aroused that he felt it would be but simple justice for him to meet such an end, for otherwise he would not have asked this fate at the hands of an "upright Justicer."

---

[1] Cymbeline, Act V, Scene V.

[2] Baker, fol. 118; Cron. angl.

[3] Shars. Bl. Comm. 37. Phillip Basset was the last to bear this title, during the reign of King Henry III.

In King Lear (Act III, Scene VI and Act IV, Scene III) Lear refers to Edgar as "most learned justicer" and Albany is made to say: "This shows you are above, You justicers," etc.

CHAPTER XXXII.

"TITUS ANDRONICUS."

Sec. 427. Encroachment upon Prince's right.
428. Proof of facts apparent.
429. Bail in Criminal Case.
430. Invoking Justice from heaven.
431. The Goddess of Justice abandoning the Earth.
432. Libelling the Senate.
433. Prosecuting for Contempt.
434. Lawful killing not murder.

Sec. 427. Encroachment on Prince's right.—

"*Aar.* . . . Now, by the gods, that warlike Goths adore,
This petty brabble will undo us all.—
Why, lords,—and think you not how dangerous
It is to jut upon a prince's right?"[1]

The Moor, in these lines, in interfering to separate the combatants, Chiron and Demetrius, suggests the dangerous nature of their quarrel, since it involves the good name of the wife of a Prince. The thought convey'd is that the danger of violating the right of a prince, is augmented, because of the importance of the person claiming the right. This is not true in countries where the law is equally enforced as it should be, for the enforcement of the right should be in equal degree, whether it is the right of a peasant or the right of a prince.

Sec. 428. Proof of facts apparent.—

"*Tit.* High emperor, upon my feeble knee
I beg this boon with tears not lightly shed,
That this fell fault of my accursed sons,
Accursed, if the fault be prov'd in them,—
Sat. If it be proved: You see it is apparent."[2]

---

[1] Titus Andronicus, Act II, Scene I.

[2] Titus Andronicus, Act II, Scene IV.

The father has about admitted the guilt of his sons, when he reflects that the crime has not been proved against them. He invokes the rule of law, which always requires proof of one's guilt, to overcome the presumption of innocence; but the king wrecks this hope on Titus' part, by replying that the evidence of their guilt is apparent and will need no proof. In this, from a strictly legal standpoint, the king was in error, for if the sons of Titus were to be legally adjudged guilty of the offense this could only be done after an investigation by a judicial tribunal, accustomed to try such issue, on proof of their guilt, by competent legal evidence. So the father was clearly right, in requesting proof, before their adjudged guilt, in this instance.

Sec. 429. Bail in criminal case.—

"*Tit.* I did, my lord: yet let me be their bail:
For by my father's reverend tomb, I vow,
They shall be ready at your highness' will,
To answer their suspicion with their lives."[1]

After his failure to prevail upon the king to accord his sons the right of a fair trial, Titus here begs that he may, at least, be permitted to go their "bail," until the evidence of their guilt shall be brought before them. Bail is here used as a noun, to describe the person accepted as the surety for the principal accused of a crime. This is a proper and accustomed use of the term.

Bail, in law, is the delivering of a person accused of crime, to one or more persons, accepted as his sureties, who are personally bound for his appearance at the proper time, before the court, to abide the judgment of the court.[2] As the surety, according to the obligation assumed, in such cases, is personally bound to produce the person of the accused one, at the specified time, unless prevented

[1] Titus Andronicus, Act II, Scene IV.

[2] Bouvier's Law Dictionary.

by sickness or other unavoidable causes, such as the death or legal imprisonment of the principal, the force of this obligation is asked to be imposed upon him, by Titus, when he promises that "they shall be ready, at your highness' will."

Sec. 430. Invoking justice from heaven.—

"*Tit.* And sith there is no justice in earth nor hell,
We will solicit heaven; and move the gods,
To send down justice for to wreak our wrongs."[1]

The Poet in these lines strongly presents the pathos of the plea of one who has failed to receive justice on the earth, of those who are endowed with the ability and upon whom the duty is placed of dispensing justice. Poor Titus, realizing that his plea for justice to the king and his court,—the only authority that could dispense justice to him,—would be without avail, turns to heaven, as the only other source from which justice could be realized, after his failure to receive it from the tribunals of man.

Sec. 431. The Goddess of Justice abandoning the earth.—

"*Titus.* Come, Marcus, come;—kinsmen, this is the way.
Sir boy, now let me see your archery;
Look ye draw home enough, and 'tis there straight.—
Terras Astraea reliquit;
Be you remember'd, Marcus, she's gone, she's fled."[2]

The calamities had befallen Titus so thick and fast, in return for his many years of upright service and loyalty to Rome, that he finally concluded that the Goddess of Justice (Astraea) had abandoned the earth, to leave mortals to suffer injustice without relief.[3] According to

[1] Titus Andronicus, Act IV, Scene III.

[2] Titus Andronicus, Act IV, Scene III.

[3] Rolfe's Titus Andronicus, p. 187, notes.

mythology Astraea was the last goddess to leave the earth, when the golden age had passed away and men began to forge weapons and perpetrate acts of violence. If violence could have driven her from the earth, then the wrongs inflicted upon the noble Titus would certainly have been a sufficient reason for her to have withdrawn from the earth.

Sec. 432. Libelling the Senate.—

"*Sat.* . . . What's this, but libelling against the Senate,
And blazoning our injustice everywhere?"[1]

Libel, in law, is the statement, by a permanent visible sign, such as writing, or by effigy, or the like, of something calculated to convey an imputation against a person, injurious to him, in his trade, profession, or calling, holding him up to contempt or ridicule, or calculated to injure him in the estimation of men.[2] Saturninus proclaims the various addresses or phillipics of the Andronici, to be libelous matter, distributed on the streets of Rome and if the attacks had been upon any certain person or persons, they might have had this effect, but a body such as the Senate, would not be libelled, by such attacks, so the conclusion of the speaker is not, in this instance, in accordance with the law.

Sec. 433. Prosecuting for contempt.—

"*Tam.* . . . rather comfort his distressed plight,
Than prosecute the meanest or the best,
For these contempts."[3]

To prosecute one, is to array one before the bar of justice and proceed, according to legal rules to ascertain the guilt or innocence of one accused of crime.[4] A con-

[1] Titus Andronicus, Act IV, Scene IV.
[2] Bouvier's Law Dictionary.
[3] Titus Andronicus, Act IV, Scene IV.
[4] Bouvier's Law Dictionary.

tempt is any act calculated to bring into disrepute the constituted legal authority of a state or country, by open defiance of the power of such authority.[1] Contempts at common law were liable to prosecution and punishment.[2]

In making the false Tamora assume the virtue of mercy, in this instance—when she had it not—Shakespeare consistently adheres to the policy of presenting her in this false attitude, that he discloses elsewhere in the play.

Sec. 434. Lawful killing not murder.—

"*Sat.* . . . May this be borne?—as if his traitorous sons,
That died by law, for murder of our brother,
Have by my means, been butcher'd wrongfully."[3]

The king, in these lines, rightfully distinguishes between the lawful killing of a human being, and the wrongful or illegal killing of a person, wherein lies the distinction between murder, or manslaughter, and a legal execution.[4] The essence of the crime of murder is that the act should be done unlawfully, i. e., not lawfully, for a justifiable cause, or in defense of the person.[5] So if the killing of the sons of Titus Andronicus had been performed in pursuance of the judgment of a properly constituted court of justice, such killing would not have been murder and to accuse the king of having murdered them, in such case, would have been wrong.

---

[1] *Ante idem.*
[2] IV Reeve's History Eng. Law, 205.
[3] Titus Andronicus, Act IV, Scene IV.
[4] Sherwood's Cr. Law; Bishop's Cr. Law.
[5] *Ante idem.*

CHAPTER XXXIII.

"PERICLES, PRINCE OF TYRE."

Sec. 435. Incest.
436. Development of criminal instinct.
437. Bill of Lading.
438. Poor man's right in Law.
439. A litigious peace.
440. Serving clients.
441. Applying judgment to the Judge.
442. Modesty of Justice.

Sec. 435. Incest.—

"*Gow.* . . . The king unto him took a pheere,
Who died and left a female heir,
So buxom, blithe, and full of face,
As heaven had lent her all his grace;
With whom the father liking took,
And her to incest did provoke."[1]

Incest is the unlawful cohabitation of persons of near degree of relationship and the crime, in many countries, is a capital offense,[2] as it should be. Members of society guilty of this unthinkable offense against humanity and the rules of common decency, should not be permitted to live and corrupt the social currents, but like the dangerous beasts whose lives are taken for the protection of the civilized man, persons who commit this offense ought to be removed from the world that no extension of their corrupt practices could result. But in most of the United States, the offense is punishable by imprisonment in the penitentiary alone.[3]

---

[1] Pericles, Prince of Tyre, Act I, Pro.

[2] This is true in Scotland.

[3] Bishop, Criminal Law.

Helicanus, in talking with Escanes, refers to this crime of Antiochus as "this heinous capital offence." (Act II, Scene IV.)

Sec. 436. Development of criminal instinct.—

"*Per.* . . . One sin, I know, another doth provoke;
Murder's as near to lust, as flame to smoke.
Poison and treason are the hands of sin,
Ay, and the targets, to put off the shame."[1]

This reply of Pericles, to the king of Antioch, illustrates a patent fact observed by the criminologist, August Goll,[2] that Shakespeare possess'd a deep insight into the psychological problems of criminology. That crime has its growth like other traits of character, cultivated by a person, is now a generally recognized fact of science, in the study of criminal types and as the Poet, in this same scene, makes the chorus, in the character of Gower observe

---

Pericles tells Antiochus, in correctly interpreting the riddle:
"*Per.* If it be true that I interpret false,
Then were it certain you were not so bad,
As with foul incest to abuse your soul." (Act I, Scene I.)

Referring to the daughter of Antiochus, Pericles, Prince of Tyre, tells Helicanus:
"*Per.* Her face was to my eye beyond all wonder;
The rest (hark in thine ear) as black as incest."
(Act I, Scene II.)

Referring to the marriage of his Mother and Uncle, Hamlet said:
"O most wicked speed, to post
With such dexterity, to incestuous sheets."
(Act I, Scene II.)

The Ghost, in Hamlet, refers to the latter's uncle as "that incestuous, that adulterous beast," and exhorts Hamlet that he shall not
"Let not the royal bed of Denmark be
A couch for luxury and damned incest." (Act I, Scene III.)
Hamlet, on soliloquizing on the guilt of his uncle, refers to him as in the "incestuous pleasures of his bed."
(Act III, Scene III.)

Hamlet addresses the King as "thou incestuous, murd'rous, damned Dane," after the death of his mother. (Act V, Scene II.)

[1] Pericles, Prince of Tyre, Act I, Scene I.
[2] Goll's Cr. Types, in Shakespeare, p. 27.

that, "by custom what they did begin, was, with long use, account no sin," so one sin or criminal act accomplish'd, others were more readily accomplished and thus the whole realm of crime was possible to the criminal who had once entered upon the path of crime, or, as Pericles expressed it, "One sin, . . . another doth provoke."

Sec. 437. Bill of lading.—

"*Per.* All leave us else; but let your cares o'erlook
What shipping and what lading's in our haven,
And then return to us."[1]

A bill of lading, at the time when the term was used by Shakespeare, was a memorandum or contract given by the master of a ship to the owner, of goods to be transported as cargo on his vessel.[2] The words have acquired a broader signification, of late years and include any such contract given by a common carrier, either by water or land, for the transportation of goods or merchandise.[3]

Pericles, on preparing for his voyage, desired a complete bill of lading of the goods or property in the haven, and in this manner he asked for the legal evidence of the contract of transportation.

Sec. 438. Poor man's right in law.—

"2 *Fish.* Help, master, help; here's a fish hangs in the net, like a poor man's right in the law; 'twill hardly come out. Ha; bots on't, 'tis come at last, and 'tis turn'd to a rusty armour."[4]

The words which Shakespeare puts into the mouth of the fisherman, in these lines, are similar to other references of the Poet to the "law's delays" and the difficulty a poor man has to free himself from the meshes of the law. This satire is not that of a lawyer, but of an observ-

[1] Pericles, Prince of Tyre, Act I, Scene II.
[2] Bouvier's Law Dictionary.
[3] Hutchinson's Carrier's (3d ed.).
[4] Pericles, Prince of Tyre, Act II, Scene I.

ing member of society, who sees the exceptional cases and makes of them the general rule. No lawyer would apply such ridicule to the proceedings of the courts whereby the rights of litigants are enforced, for being partly responsible for the proceedings in vogue and the end and object being the equal and free enjoyment and enforcement of the rights of all suitors, a lawyer is the last person to proclaim against the practices of the courts or to bring his profession into disrepute. But not so a poet, with Shakespeare's grasp upon all subjects. He would remedy all defects in every system and his natural sympathy would go out to the poor and the oppress'd. He considered it difficult, no doubt, for a poor man, to obtain justice and viewed the "law's delay" in his case, as a particular hardship, when as matter of fact, his observation may have obtained to the exceptional cases wherein the dispensation of justice did not accord with his ideas of mercy or charity.

Sec. 439. A litigious peace.—

"*Per.* Most honour'd Cleon, I must needs be gone;
My twelve months are expir'd, and Tyrus stands
In a litigious peace."[1]

The Prince of Tyre here places his kingdom in the attitude of a litigant who enjoys peace because of his defence of his right, in law. The comparison is not without merit, for as an individual by the defense of his rights, in law, gains a reputation which will bring him peace, by the respect which his fellows will entertain for his course, so a nation, by preparations for war, or by actual warfare, will gain a reputation which will ultimately bring peace.

Sec. 440. Serving clients.—

"*Bawd.* . . . When she should do for clients her fitment, and do me the kindness of her profession, she

[1] Pericles, Prince of Tyre, Act III, Scene III.

has me her quirks, her reasons, her master-reasons, her prayers, her knees, that she would make a puritan of the devil, if he should cheapen a kiss of her."[1]

This satirical reference of the Bawd, wherein she compares one of her trade to a lawyer, practicing his profession, is not unlike the practices of many of the profession of the law, if the facts were known. While the per cent that can, legitimately, be compared to such a foul profession, or trade, are few, still there are by far too many who, like the bawd, serve any who come, with a fee, which may tempt the commission of offenses not less odious than the crime of adultery.

Sec. 441. Applying judgment to the judge.—

"*Mar.* If ye were born to honour, show it now;
If put upon you, make the judgment good
That thought you worthy of it."[2]

If this reflection, by the incumbent of the judgment-seat, were indulged in generally, it would make the judgments pronounced more equitable, no doubt. It is but the application of the golden rule, nothing less, i. e., "do unto others as you would have others do unto you," and this is a very good rule of law, as it is of one's private conduct.

Sec. 442. Modesty of justice.—

"*Per.* . . . Falseness cannot come from thee, for thou look'st
Modest as justice, and thou seem'st a palace
For the crown'd truth to dwell in."[3]

These words of Pericles, to his daughter, in the simile used, show the exalted ideal of the Poet, in regard to justice, a virtue that he almost deified, so broad was his

[1] Pericles, Prince of Tyre, Act IV, Scene V.
[2] Pericles, Prince of Tyre, Act IV, Scene VI.
[3] Pericles, Prince of Tyre, Act V, Scene I.

sympathy for his fellowman and his poetic justness. Justice does not go hand in hand with ostentation or loudness; but this virtue is usually found with modesty and purity. Marina, to her father, seemed "a palace for the crown'd truth to dwell in" and as the Poet's fertile mind observed, this would likewise be a fitting habitation for the twin virtue, justice.

CHAPTER XXXIV.

"KING LEAR."

Sec. 443. Divesting property.
444. Entailment of estate.
445. Reservation, in grant.
446. Parricide.
447. Identifying criminals by pictures.
448. An "action-taking" knave.
449. Crimes unwhipped by Justice.
450. Summoners.
451. "Whipped from tithing to tithing."
452. Imaginary trial of Goneril.
453. Equal rank in Trial by Battle.

Sec. 443. Divesting property.

"*Lear.* . . . Tell me, my daughters,
(Since now we will divest us both of rule,
Interest of territory, cares of state,)
Which of you, shall we say, doth love us most?"[1]

To divest one of property, of the kind referred to by the King, is to dispossess one and to convey or vest the title in another.[2] Divestiture is characteristic of the term real property, or of the title to an office,[3] for it is the taking away of the title, so the King speaks of his act of divesting himself of "rule, interest of territory and cares of state," meaning that he will not only relinquish the title to his lands, but to his office, as king, as well, and the cares accompanying it.

---

[1] King Lear, Act I, Scene I.
[2] Bouvier's Law Dictionary.
[3] Tiedeman's R. P. (3d ed.).

Sec. 444. Entailment of estate.—

"*Lear.* . . . We make thee lady: To thine and Albany's issue
Be this perpetual.—What says our second daughter,
Our dearest Regan, wife to Cornwall? Speak.

. . . . . .

To thee and thine, hereditary ever,
Remain this ample third of our fair kingdom;
No less in space, validity and pleasure,
Than that confirm'd on Goneril."[1]

In conveying and confirming one-third of his kingdom upon Goneril and her husband and their issue, as the Poet makes Lear do, in these lines, he practically entailed the third of his kingdom to his daughter and the heirs of her body by Albany.[2]

An entailment arose at common law, whenever the words of the conveyance indicated an intent on the part of the grantor that the legal course of succession of the land was cut off and the title was to vest in the grantee and certain of his or her heirs, as distinguished from all of the grantee's heirs, as, in this instance, where the grant was to one and the heirs of her body, or issue, by a certain husband. This was an estate tail, known as a special entail. A grant to a man "and the heirs of his body," was a general entail, as distinguished from a grant "to a man and the heirs of his body, by his wife, Joan."[3]

And the limitation, in the grant of the third of the kingdom to Regan, "in space, validity and pleasure," like that "confirm'd on Goneril," amounted to a creation, in Regan, of a fee-simple conditional, or an estate tail, at common law.

---

[1] King Lear, Act I, Scene I.

[2] Tiedeman's R. P. (3d ed.). For legislation concerning estates tail, see II Reeve's History Eng. Law, 459. In the grant to his first daughter, the language used by Shakespeare is not unlike the habendum of a comman law conveyance. And this is followed, it will be noted, further on, by the confirmation, "Which, to confirm, this coronet part between you."

[3] II Reeve's History, *supra.*

Sec. 445. Reservation, in grant.—

"*Lear.* . . . Ourself, by monthly course,
With reservation of a hundred knights,
By you to be sustained, shall our abode
Make with you, by due turns."[1]

A reservation, in law, is a term used to denote that part of an estate which is retained by the grantor, in the grant of a portion of his estate to another.[2] As the term land is made up of different elements, going to compose the legal entity, it is sometimes granted, with a reservation of the minerals in the soil.[3] So, in this instance, after giving his kingdom to his daughters, the king reserved, or retained to himself, the right to a hundred knights, to be by his grantees sustained, and the right to make his home with his daughters, by turn.

Sec. 446. Parricide.—

"*Edm.* . . . But that I told him, the revenging gods
'Gainst parricides did all their thunders bend;
Spoke, with how manifold and strong a bond
The child was bound to the father."[4]

By the Roman law, every one who murdered a near relative was held guilty of parricide, but by the English law, the term is usually applied to one who murdered his father, or the person standing in the relation of a parent to the murderer.[5] By the English law, the punishment

---

[1] King Lear, Act I, Scene I.

[2] Tiedeman's R. P. (3d ed.).

[3] White's Mines and Mining Remedies, Chap. VIII.

When told by his daughter that his followers could not be maintained in a greater number than twenty-five, Lear tells her that "I gave you all—Made you my guardians, my depositaries; But kept a reservation to be follow'd with such a number." (Act II, Scene IV.)

[4] King Lear, Act II, Scene I.

[5] Bishop's Criminal Law; Russell, Crimes; Sherwood's Cr. Law.

of parricides was the same as that of any other murderer,[1] but by the Roman law, a parricide was sewed in a leather sack with a live cock, a viper, a dog, and an ape, and cast into the sea to take his chances with these companions.[2] Edmund uses the term, as it was limited by the English law, to the murderer of the parent.

Sec. 447. Identifying Criminals by pictures.—

"*Gloster.* . . . Besides, his picture
I will send far and near, that all the kingdom
May have due note of him; and of my land,
Loyal and natural boy, I'll work the means
To make thee capable."[3]

While photography had not reached a state of perfection that would enable the taking of pictures, in the manner that obtains to-day,[4] it was customary, during the Poet's time, to send word pictures, or descriptions of criminals abroad for the identification of those who violated the law,[5] and pictures by wood engravings and steel plates had existed since the middle of the fifteenth century.[6]

It is not improbable, therefore, that Gloster had such "picture" of his own son, that he could send around, and the reference is not to photographs as has been understood.[7]

---

[1] Bouvier's Law Dictionary.

[2] See Gibbon, Niebuhr, Arnold.

[3] King Lear, Act II, Scene I.

[4] The alchemists of the 16th century made the important discovery that horn silver would blacken on exposure to light, and this was the most advanced step in photography they made. Scheele, a Swedish chemist, found that it was blackened quickest by the violet ray of a solar spectrum, in 1777, and twenty-five years later Ritter, of Jena, demonstrated the existence of chemically active non-visible rays, beyond the violet ray of the spectrum. Daguerre produced the first dauguerratype, in 1825.

[5] See Rolfe's King Lear, p. 215, notes.

[6] Ottley's Origin and History of Engraving.

[7] Lord Campbell seems to have made this mistake. Rolfe's King Lear, p. 215, notes, *supra*.

Sec. 448. An "action-taking" knave.—

"*Kent.* A knave; a rascal; an eater of broken meats; a base, proud, shallow, beggarly, three-suited, hundred-pound, filthy, worsted-stocking knave; a lily-livered, action-taking, knave, a whoreson, glass-gazing, super-serviceable, finical rogue."[1]

Kent could hardly have used worse epithets toward Oswald than this tirade of abuse. A "lily-livered, action-taking, . . . glass-gazing, . . . rogue," is one who was a coward, with a white liver. One who would resent an affront by filing a suit at law, rather than to fight it out, like a man,[2] and he intended to tell him that he was such an effeminate creature that he would stand and gaze at himself, for hours in the looking glass.

Sec. 449. Crimes unwhipped by justice.—

"*Lear.* Tremble, thou wretch,
That hast within thee undivulged crimes,
Unwhipp'd of justice: Hide thee, thou bloody hand;
Thou perjur'd, and thou simular of virtue,
That art incestuous."[3]

This is one of the most stirring scenes in this great tragedy and the comparison, by the mad King, of the vengeance of heaven, as evidenced by the storm and thunder, to the punishment of the law, for the crimes of the guilty, is, indeed, realistic. The thought expressed, is, that if there are crimes which have gone unpunished by the laws of man, they cannot escape the vengeance of God, but the guilty are sure to suffer at his hands. The mad king feels no concern for himself, but at such a time as this, the wretch who has committed undivulged crimes, unwhipped of justice; the perjured, counterfeit man of

[1] King Lear, Act II, Scene II.

[2] This is Doctor Rolfe's explanation of this term. Rolfe's King Lear, p. 218, notes.

[3] King Lear, Act III, Scene II.

virtue, who is really incestuous, had better beware the vengeance from on high.

The object of justice is the punishment of crimes, as well as the enforcement of rights, so the interpretation of the mad king is not amiss, in attributing to justice the punishment, akin to whipping, for the crimes it undertakes to punish.

Sec. 450. Summoners.—

"*Lear.* . . . Close pent-up guilts,
Rive your concealing continents and cry
These dreadful summoners grace. I am a man
More sinn'd against than sinning."[1]

In these lines, the mad King warns those who have violated the mandates of the great Judge from on High. The perjured, incestuous, "simulator of virtues," who have practiced on men's lives, had best beware; their guilty consciences must be put down and they ought to beg mercy from the heavens "summoners." A summoner is an officer authorized to serve process, such as "summoning offenders before a tribunal."[2]

Sec. 451. "Whipped from tithing to tithing."—

"*Edgar.* Poor Tom, that eats the swimming frog, the toad, the tadpole, the wall-newt and the water; that in the fury of his heart, when the foul fiend rages, eats cow-dung for sallets; swallows the old rat and the ditch-dog; drinks the green mantle of the standing pool; who is whipped from tithing to tithing, and stocked, punished and imprisoned."[3]

Disguised as poor "Mad Tom," Edgar would come within the description of persons defined as "vagrants, or vagabonds," by the statute 39 Elizabeth, c. 4,[4] for by this

[1] King Lear, Act III, Scene II.
[2] Rolfe's King Lear, p. 238, notes.
[3] King Lear, Act III, Scene IV.
[4] This statute repealed 18 Elizabeth, c. 3, and 35 Eliz., c. 5.

act all "persons delivered out of goal, who beg for their fees," and "all who shall wander about begging" are defined as "rogues, vagabonds and sturdy beggars" and such, when found by any justice, constable, headborough or tithingman, "be stripped naked from the middle upwards, and be openly whipped till he is bloody, and shall then be sent from parish to parish, by the officers of the same, till he come to the parish where he was born,"[1] etc. And during the reigns of Henry VII,[2] Edward VI[3] and Henry VIII,[4] similar acts were passed against vagrants and beggars, by which similar punishment by whipping and the stocks was to be assessed against these offenders.[5]

Sec. 452. Imaginary trial of Goneril.—

"*Lear.* It shall be done, I will arraign them straight:—
Come, sit thou here, most learned justicer:—(To Edgar.)
Thou, sapient sir, sit here. (To the Fool)—Now, you she foxes:—
Edg. Look, where he stands and glares:—
Wantest thou eyes at trial, madam?

. . . . . .

Lear. I'll see their trial first:—Bring in the evidence.—
Thou robed man of justice, take thy place; (To Edgar)
And thou, his yoke-fellow of equity, (To the Fool)
Bench by his side:—You are of the commission, (To Kent)
Sit you too.
Edg. Let us deal justly. . . .
Lear. Arraign her first; 'tis Goneril. I here take my oath before this honorable assembly, she kicked the poor king, her father."[6]

---

[1] V Reeve's History Eng. Law, p. 209.
[2] II Henry VII, c. 2, and 19 Henry VII, c. 12.
[3] 4 Edw. VI, c. 16, 5 and 6 Edw. VI, c. 2.
[4] 22 Henry III, c. 12.
[5] V Reeve's History Eng. Law, p. 210.
[6] King Lear, Act III, Scene VI.

It is notable, in these lines, that the Poet does not forget to have the mad king insist upon an orderly proceeding in the imaginary trial of his daughter, Goneril. At common law, no one charged with a crime could be put upon trial, without being first arraigned, and asked whether he or she was guilty or not guilty of the charge.[1] The mad king insists upon the adherence to this legal preliminary at the trial. As justice is symbolized by the "Blind Ey'd Goddess," Edgar intimates that the accused may not want to be tried by her, but as her guilt is great, she may require eyes at her trial to see her innocence. At common law, the occupant of the judgment seat was called a "justice" and he was said to occupy the Bench;[2] the Chancellor, or judge who dispensed equity, on the equity side of the court, could be likened to a "yoke-fellow" in the team of jurists, working to dispense justice, and when two or more judges sat in judgment they were called a Commission, so the reference to Kent, as being "of the Commission," is not improper, but shows the discrimination, in legal matters, of the mad king. After the arraignment, it was always essential to establish the guilt of the accused, by competent evidence, as guilt was never presumed, but all persons were presumed innocent of crime, until proven guilty, so the mad king after the arraignment, calls for the evidence and deposes and gives evidence, under oath, of the offense he thinks his daughter guilty of.

[1] Bishop's Cr. Proc., Vol. I, Chap. Arraignment; Sherwood's Cr. Law.

[2] Bouvier's Law Dictionary.

To some, it might seem beyond belief, that the Poet would make the mad king follow so truly, the regular forms of law, in this trial scene. But to the author of these Commentaries, it is not unreal, for he once witnessed an insane lawyer, defend himself before a Commission to inquire into his sanity, with all the cunning of the sanest jurist, familiar with every detail of the proceeding.

This whole imaginary trial is the due and regular proceeding, outlined by one familiar with the administration of the criminal law of England.

Sec. 453. Equal rank, in trial by battle.—

"*Gon.* This is mere practice, Gloster;
By the law of arms, thou wast not bound to answer
An unknown opposite; thou art not vanquish'd,
But cozen'd and beguil'd."[1]

Goneril here advises her lover of the law of trial by battle, for by the law of arms, through which this barbarous custom was carried out, if the adversary was not of equal rank, or known to be of equal rank, with the person challenged, the latter need not fight, and, if he did fight, in case of his defeat, he was not adjudged guilty, as he would have been had he fought with one of equal rank.[2]

---

[1] King Lear, Act V, Scene III.

[2] Reeve's History Eng. Law, Vol. I, p. 393; Vol. III, p. 329; Vol. IV, p. 58.

CHAPTER XXXV.

"ROMEO AND JULIET."

Sec. 454. Bond to Keep the Peace.
455. Wife's legal status.
456. Sale of Life Tenure.
457. Amercement by fine.
458. Murder to kill murderer illegally.
459. Tybalt's death murder at Romeo's hands.
460. No slander to speak the truth.
461. Label appended to deed.
462. Sale of poison contrary to Italian Law
463. Purging impeachment.

Sec. 454. Bond to keep the peace.—

"*Cap.* And Montague is bound as well as I,
In penalty alike; and 'tis not hard, I think,
For man as old as we to keep the peace."[1]

Offenses against the public peace are those offenses which consist either in an actual breach of the peace, or conduct which leads directly to an open breach.[2] Such offenses may be classified under the heads of unlawful assemblies, riots, affrays, challenging and fighting and duels, and other similar misdemeanors.

The offense committed by the servants of these rival houses of Capulet and Montague, was properly an affray, which is a public assault, or one committed in the presence of third parties. A duel was such an offense and because of the likelihood of others present joining in the affray, all present were held to be principal offenders, at common law, and the principals were liable to arrest and subject to be bound over to keep the peace.[3]

[1] Romeo and Juliet, Act I, Scene II.
[2] Cooley, Torts, 348.
[3] III Reeve's History Eng. Law, p. 202.

The Prince had commanded the peace, in the street brawl, in the preceding scene, when he told Capulet and Montague: "If ever you disturb our streets again, your lives shall pay the forfeit of the peace." And they were commanded to appear before him at "old Free-town, our common judgment-place," to know his further pleasure. At this hearing, the two enemies had been bound over to keep the peace, from these lines of Capulet as this was a familiar proceeding, in vogue in all such causes.[1]

Sec. 455. Wife's legal status.—

"*Fri.* Come, come with me, and we will make short work;
For, by your leaves, you shall not stay alone,
Till holy church incorporate two in one."[2]

The Friar here clearly referred to the legal status of the wife, after celebration of the holy rites of the common law civil contract of marriage. At common law, after marriage, the wife had no separate legal existence but her legal entity was merged, so to speak, into that of her husband.[3] By the *fiat* of the law the two became one, by marriage, and the otherwise separate and distinct legal existence of the *femme sole,* was abolished and the two became "incorporate" into one.[4]

---

[1] Ever since the reign of Edward I, it had been the office of the king's justices, of inferior judges, ministers of justice, sheriffs and the like officials, to keep the peace of the kingdom. "The manner in which these officers might exercise their authority was, by committing to custody all those whom they saw actually breaking the peace; or, as said above, they might admit them to bail, or oblige them to give sureties for keeping the peace." III Reeve's History Eng. Law, p. 202.

[2] Romeo and Juliet, Act II, Scene VI.

[3] Bishop, Mar. & Div., Chap. II.

[4] Rogers, Dom. Rel.

In Venus and Adonis, it is said: "Her arms do lend his neck a sweet embrace; Incorporate then they seem; face grows to face." (539, 540.)

Sec. 456. Sale of life tenure.—

"*Ben.* An' I were so apt to quarrel as thou art, any man should buy the fee-simple of my life, for an hour and a quarter.
Mer. The fee-simple. O simple."[1]

A fee-simple estate is an estate of inheritance, passing directly to the heirs general of the owner—as distinguished from a base or qualified fee which goes to special heirs of his body—if he dies intestate, subject to no restrictions or qualifications and it is the highest estate known to the law of land tenures.[2] A fee-simple estate may either be created by deed, or acquired by purchase,[3] as elsewhere seen.[4]

Benvolio means to say to Mercutio, that if he were as quarrelsome as the latter, his life would be in such danger, that he would sell the whole tenure of his life for an hour and a quarter. Mercutio, who has more faith in his own prowess, ridicules the idea of selling the fee-simple of his life for such a small return and pronounces such a bargain "simple."

Sec. 457. Amercement by fine.—

"*Prin.* . . . I have an interest in your hates' proceeding,
My blood for your rude brawls doth lie a bleeding;
But I'll amerce you with so strong a fine,
That you shall all repent the loss of mine."[5]

To amerce one is to assess a pecuniary punishment at the will of the king or lord paramount, in some arbitrary sum, for the commission of some offense, for which the penalty is assessed.[6] The difference between a fine and an

[1] Romeo and Juliet, Act III, Scene I.
[2] Tiedeman, R. P., Chap. III (3d. ed.).
[3] *Ante idem.*
[4] See Chapter III.
[5] Romeo and Juliet, Act III, Scene I.
[6] Bouvier's Law Dictionary.

amercement, is that the former is fixed, within certain limits, by the law, while the latter may be assessed arbitrarily, at the will of the chief executive.

The Prince, in these lines, advises the combatants that he is interested in the affrays, whereby the State loses its citizenship, for in killing the citizens, the State and indirectly the Prince, himself, loses his life blood, in the death of his citizens. This is the basis of the exercise of police power, in all civilizations, and the Poet struck at the very element of the criminal law, in the language used by the Prince.

Sec. 458. Murder to kill murderer illegally.—

"*Mon.* Not Romeo, prince, he was Mercutio's friend;
His fault concludes but, what the law should end
The life of Tybalt.
Prin. And for that offense,
Immediately we do exile him, hence."[1]

The argument of Romeo's father is based upon his affection for his son, not upon any principle of law. No one has the right to take the law into his own hands and it is none the less murder, that the deceased was himself a murderer, unless he was executed, according to law.[2] Tybalt was a murderer in killing Mercutio, for death by duelling, was murder, at common law,[3] but this did not give Romeo a right to kill him, for he was entitled to a trial for the offense and could only be legally killed, after a legal conviction for the crime. The prince therefore decided according to law, in refusing to recognize this defense for Romeo.

Sec. 459. Tybalt's death murder at Romeo's hands.

"*Fri.* O deadly sin: O rude unthankfulness:
Thy fault our law calls death; but the kind prince,

[1] Romeo and Juliet, Act III, Scene I.
[2] Bishop's Criminal Law.
[3] Sherwood's Criminal Law.

Taking thy part, hath rush'd aside the law,
And turn'd that black word death to banishment."[1]

The Friar was right. Taking human life, by duelling, at common law, was murder and murder was punishable by death.[2] So Romeo was guilty of murder or manslaughter, at the least, in killing Tybalt by duelling and was liable to be punished by death, for the offense. It was an act of clemency or pardon, on the part of the Prince, to spare his life and to exile him, instead. And in doing so, he "rush'd aside the law" and prevented the lawful sentence of death, by assessing the milder punishment of banishment.

Sec. 460. No slander to speak the truth.—

"*Jul.* That is no slander, sir, that is a truth;
And what I spake, I spake it to my face."[3]

Juliet's defense to the charge of slander that Paris prefers against her is two-fold, first that she spoke the truth and not a falsehood, and, second, that she did not publish the words, but uttered them to his face. Both of these replies were good legal defenses to the charge of slander, for the truth of the assertion is always a defense and if the words were spoken to the alleged injured person and not about him, to a third person there is no publication of the slander, hence, no slander, in law.[4]

Sec. 461. Label appended to deed.—

"*Jul.* . . . And ere this hand, by thee to Romeo seal'd,
Shall be the label to another deed,

[1] Romeo and Juliet, Act III, Scene III.
[2] Bishop's Criminal Law.

The good Friar further said: "The law, that threatens death, becomes thy friend, And turns it to exile." (Act III, Scene III.)

[3] Romeo and Juliet, Act IV, Scene I.
[4] Cooley's Torts, 193.

Or my true heart with treacherous revolt
Turn to another, this shall slay them both."[1]

In the time of Shakespeare, the act of sealing written instruments, such as deeds of conveyance, was given much more prominence than it is to-day, for while signing was dispensed with, as a legal prerequisite of such contracts, it was essential that all such written instruments should be sealed. For this purpose soft wax was used and an impression was made, upon a separate ribbon, or "label," which was attached to the deed, leaving it appendant, as a label.[2] It is not probable, however, that Juliet had ever executed such a deed and why she should use these legal terms, is of course a mystery, except that it shows the Poet was himself familiar with them.

Sec. 462. Sale of poison contrary to Italian law.—

"*Ap.* Such mortal drugs I have; but Mantua's law
Is death, to any he that utters them."[3]

Long prior to the period of the Poet's time, the prevalency of death by poisoning had led to the strictest laws preventing the sale of drugs that would take human life, in cities and countries subject to the Roman law.[4] During the reign of Henry VIII, in England, the crime became so odious that a statute was passed making murder by poisoning punishable by boiling the murderer in lead and oil.[5] By the 14 and 15 Victoria, the sale of arsenic and other poisons is regulated and forbidden, except in accordance with the law, under strict penalties.[6]

[1] Romeo and Juliet, Act IV, Scene I.

[2] The Duke of York discovered the contracts in his son's possession, by the seals, or labels, protruding from his pocket, (Richard II, Act V, Scene II) and in Cymbeline the word label was used for the deed itself. (Act V, Scene V.)

[3] Romeo and Juliet, Act V, Scene I.

[4] Heineccii, Hist. Jur. Civ.; Niebuhr, Roman Hist.; Hook's Hist. Rome.

[5] IV Reeve's Hist. Eng. Law, 427.

[6] Bishop's Criminal Law; Bishop's Stat. Crimes.

Sec. 463. Purging impeachment.—

"*Fri.* . . . And here I stand, both to impeach and purge
Myself condemn'd and myself accus'd."[1]

To impeach, is to accuse or charge one with a crime or misdemeanor, as well as to exhibit charges of maladministration against a public officer, before a competent tribunal.[2] To purge, is to clear from guilt or moral defilement, by establishing one's innocence of the charge of crime.[3] In other words, the Friar, while admitting the facts which will show his connection with the return of Romeo, and his presence at the tomb, will disclose the truth sufficient to show that he had no criminal connection with the affair and thus free himself from any charge of wrongdoing.

Romeo admitted that he was asking the Apothecary to violate the law, but urged him to do so, by the following reasoning:

"The world is not thy friend, nor the world's law:
The world affords no law, to make thee rich;
Then be not poor, but break it and take this."

(Act V, Scene I.)

Speaking of the laws against poisoning in Europe, Doctor Rolfe, in Romeo and Juliet, said: "Secret poisoning became so common in Europe, in the 16th century, that laws against the sale of poisons were made in Spain, Portugal, Italy and other countries." Rolfe's Romeo and Juliet, p. 264, notes.

[1] Romeo and Juliet, Act V, Scene III.
[2] Bouvier's Law Dictionary.
[3] Bouvier's Law Dictionary.

CHAPTER XXXVI.

"HAMLET, PRINCE OF DENMARK."

Sec. 464. Law and Heraldry.
465. Trespass *vi et armis*.
466. Forgeries.
467. Appurtenances.
468. Detecting crime.
469. *Quietus*.
470. Fratricide.
471. No corrupted Justice above—Evidence by interested party.
472. Counsellor.
473. Pleas in Abatement.
474. "Crowners-quest Law."
475. Hamlet's legal comments on the skull.
476. Hamlet's survivorship and disposal of the Crown.

Sec. 464. Law and Heraldry.—

"*Hor.* . . . our valiant Hamlet
(For so this side of our known world esteem'd him,)
Did slay this Fortinbras, who, by a seal'd compact,
Well ratified by law and heraldry,
Did forfeit, with his life, all those his lands,
Which he stood seiz'd of, to the conqueror:
Against the which, a moiety competent
Was gaged by our king; which had return'd
To the inheritance of Fortinbras,
Had he been vanquisher; as, by the same co-mart,
And carriage of the article design'd,
His fell to Hamlet."[1]

The Poet never forgets to mention the legal prerequisite to such legal documents as this "compact," that it contained a seal, for, in his day, all such legal instruments were required to be sealed, and much greater importance was attached, in law, to the requisite of sealing, than at the present day.[2]

[1] Hamlet, Prince of Denmark, Act I, Scene I.

[2] II Reeve's History English Law, 54.

By the terms "law and heraldry" it was intended to express the thought that the contract complied with the legal requirements and was in form and substance a legal document, and since courts of chivalry took cognizance of undertakings touching deeds of arms and warlike enterprises outside the realm, that this agreement also had the binding force of honour given it by heraldry.

By the terms of the "compact," if Fortinbras should be vanquished, his lands were to go to Hamlet and, on the other hand, in case of Hamlet's fall, his lands were to go to Fortinbras. "Co-mart" means joint agreement or bargain, by the terms of which the loser was to also lose his lands.

Sec. 465. Trespass vi et armis.—

"*Hor.* . . . young Fortinbras,
Of unimproved mettle hot and full,
Hath, in the skirts of Norway, here and there,
Shark'd up a list of landless resolutes,
For food and diet, to some enterprise
That hath a stomach in't: which is no other
(As it doth well appear unto our state,)
But to recover of us by strong hand,
And terms compulsatory, those 'foresaid lands
So by his father lost."[1]

In legal contemplation, the land of every man is surrounded by a *close,* or boundary, and even in the absence of a physical boundary, such as a fence or hedge, there exists this invisible ideal boundary, which effectually separates the land of the owner from all the land of his neighbors. Any unwarranted breaking through this *close,* at common law, gave the remedy by an action *quare clausum fregit,* and if the entry was accomplished by force and violence, it gave rise to an action *vi et armis.*[2] Even if a man had the legal title to land, he must not

[1] Hamlet, Prince of Denmark, Act I, Scene I.

[2] Cooley, Torts.

attempt to recover possession by force and arms, but must resort to a legal action for the possession and if he did, he was liable to the action of trespass *vi et armis*.[1]

Horatio here conveys the idea that Fortinbras, in coming for his lands with force and violence is a trespasser, for although his father may have lost his title wrongfully, he should not have taken the law into his own hands; but this reasoning, while applicable to the property rights of an individual, could not be applied to the land of a kingdom and force and violence is yet the only method known for the enforcement of a right, which a nation refuses to recognize, since no forum exists for the enforcement of such claims in any other manner.

Sec. 466. Forgeries.—

"*Pol.* . . . and there put on him,
What forgeries you please; marry, none so rank
As may dishonour him."[2]

Forgery, at common law, was the fraudulent making or altering of a writing or seal, to the prejudice of another's rights.[3] It is an essential of the crime that the alteration or counterfeit was made with the intent to defraud, but it is not essential that an actual defrauding should result.[4]

Polonius, here, in his instruction regarding the detection of his son in any small offenses, authorizes his accusation of "what forgeries you please," but in qualifying this phrase, by the subsequent advice that he should not be accused of anything which could dishonour him, it is apparent that the term is used in other than its strict legal interpretation, and rather in the sense of fabrication, or

[1] As far back as the reign of Edward I, in England, actions were filed for trespass *vi et armis*, against those wrongfully entering upon land of another. III Reeve's History English Law, 57, 61.

[2] Hamlet, Prince of Denmark, Act II, Scene I.

[3] Bouvier's Law Dictionary.

[4] Bishop's Criminal Law, Forgery.

license, since to accuse one of forgery would be to charge him with an offense that would work his dishonor directly.

Sec. 467. Appurtenances.—

"*Ham.* . . . Come then, the appurtenance of welcome is fashion and ceremony."[1]

In the law of real property, appurtenances are those things, belonging to another thing as principal, which pass as incidents of the principal thing, as in the conveyance of a house and tract of land, a right of way would pass, as a necessary incident of the grant.[2]

Welcome, being the principal thing expressed, in the speech made by Hamlet, he lists fashion and ceremony, as mere incidents, accompanying the welcome, as matter of right.

Sec. 468. Detecting crime.—

"*Ham.* . . . I have heard,
That guilty creatures, sitting at a play,
Have, by the very cunning of the scene,
Been struck so to the soul, that presently
They have proclaim'd their malefactions.[3]

Like many other lines of Shakespeare, this verse evidences the familiarity of the Poet with the psychological problems of criminology, which abound in his criminal types. Expert criminologists have noted how he seems to solve the deepest and most intricate questions of this science, as if in play.[4]

The effect of suggestion to the criminal was certainly appreciated, as a means of bringing the actions to bear which would disclose the evidence of his crime, if not by a voluntary confession, by words, or acts, from which his

---

[1] Hamlet, Prince of Denmark, Act II, Scene II.
[2] Tiedeman's R. P. (3d ed.); Bouvier's Law Dictionary.
[3] Hamlet, Prince of Denmark, Act II, Scene II.
[4] Goll's Criminal Types in Shakespeare, 24, 26.

guilt could be determined. It is needless to say that this same method is resorted to by detectives and criminologists to discover the evidences of crime in all civilized countries to-day.[1]

Sec. 469. Quietus.—

"*Ham.* . . . For who would bear the whips and scorns of time,
The oppressor's wrong, the proud man's contumely,
. . . . . .
When he himself might his quietus make,
With a bare bodkin?"[2]

Quietus is a final and complete discharge or acquittance, from some existing obligation, as an order by a competent tribunal, as to a claim, over which it has jurisdiction, that it shall be forever silenced or discharged.[3] The term is used in the sense of rest, repose, or death, by Hamlet, in these lines and he concludes that if it were not for the something after death, "which must give us pause"; that makes calamity of so long life, any one would be tempted

---

[1] *Ante idem.*

Hamlet tells Horatio:

"Observe my uncle; if his occulted guilt
Do not itself unkennel in one speech,
It is a damned ghost that we have seen." Act III, Scene II.)

Considering how the play will affect his Uncle, Hamlet said: "*Ham.* . . . I'll have these players play something like the murder of my father, Before mine uncle: I'll observe his looks." and in the preceding lines, he said: "For murder though it have no tongue, will speak with most miraculous organ." (Act II, Scene II.)

[2] Hamlet, Prince of Denmark, Act III, Scene I.

[3] Bouvier's Law Dictionary.

Speaking of Nature's sovereign power over mortals, the Poet said, in the CXXVI' Sonnet:

"Her audit, though delay'd, answer'd must be
And her quietus is to render thee." (11, 12.)

to end it all—to bring the much desired repose and quiet—by his own hand.

Sec. 470. Fratricide.—

"*King.* O, my offence is rank, it smells to heaven;
It hath the primal eldest curse upon 't,
A brother's murder."[1]

The crime of murdering a brother is known to the law as the crime of fratricide[2] and this is what the King refers to, in these lines. The fact that the murder of Abel, by his brother Cain, was the first case of fratricide on record, justified the King in his reference to his case as one that "smells to heaven," since it had the "primal eldest curse upon 't," for the Lord said unto Cain: "And now art thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand."[3]

Sec. 471. No corrupted justice above, Evidence by interested party.—

"*King.* . . . In the corrupted currents of this world,
Offence's gilded hand may shove by justice;
And oft 'tis seen, the wicked prize itself
Buys out the law: But 'tis not so above:
There is no shuffling, there the action lies
In his true nature; and we ourselves compell'd
Even to the teeth and forehead of our faults,
To give in evidence."[4]

The Poet's voice is always raised against the class of crimes known as offenses against the enforcement of justice and he aptly draws the terrible example of a corrupted judiciary, as compared to the even handed justice above—according to our conceptions—where "there can be no shuffling," but "the action lies, in its true nature," and

[1] Hamlet, Prince of Denmark, Act III, Scene III.
[2] Bouvier's Law Dictionary; Bishop's Criminal Law.
[3] Genesis, IV, 11, 12.
[4] Hamlet, Prince of Denmark, Act III, Scene III.

according to infallible standards, the right alone prevails. This is a beautiful picture for one who fully appreciates the beauty of the virtue which we call justice. But these lines do more than this, and also present the injustice of the common law rule regarding the testimony of interested persons and those accused of crime.

At common law a party to the record, or one directly interested in the result of the suit was not a competent witness,[1] and even under the rule of evidence obtaining in England and the United States today, one accused of a crime cannot be compelled to give testimony against himself,[2] nor can a witness be compelled to answer questions that tend to incriminate himself.[3] This rule of evidence was evidently known to Shakespeare and it impressed him as not in keeping with the realization of justice, for while premising that such evidence could not be extorted by the laws of man, he compared this rule with the ideal rule that ought to obtain—according to his judgment—where "we ourselves" could be "compell'd, even to the teeth and forehead of our faults, to give in evidence."

Sec. 472. Counselor.—

"*Ham.* . . . Indeed, this counselor,
Is now most still, most secret, and most grave,
Who was in life a foolish prating knave."[4]

A counselor is one who is consulted by a client in a pending cause, or who gives advice in regard to questions of law, or one whose profession is to advise in matters of law, and manage causes for his clients.[5]

As some counselors are garrulous and talk too much in giving their advice, Hamlet evidently felt—as the

[1] Greenleaf on Evidence (14th ed.).
[2] *Ante idem.*
[3] Greenleaf on Evidence (14th ed.).
[4] Hamlet, Prince of Denmark, Act III, Scene IV.
[5] Bouvier's Law Dictionary.

Poet makes him speak—the common contempt generally entertained for such members of the legal profession, for Polonius dead, was "most still, most secret, and most grave," "who was, in life, a foolish prating knave," and thus, the conclusion is irresistible, that counselors who betray their clients' secrets, those who could not be still or grave, were considered better off, as was Polonius.

Sec. 473. Pleas in abatement.—

"*King.* . . . That we would do,
We should do when we would; for this *would* changes,
And hath abatements and delays as many,
As there are tongues, are hands, are accidents."[1]

This verse refers to the common custom of filing pleas in abatement in the common law practice, which were pleas filed by a defendant in a civil or criminal case, by means of which, on some formal or technical ground, he sought to abate or quash the action.[2] Such pleas are to be distinguished from pleas to the merits or pleas in bar, which affected the right, rather than the remedy, that the former plea was addressed to generally.[3] As the effect of such pleas, if successful, was to bring about a new action and hence a consequent delay, the Poet, as elsewhere,[4] condemns such practice.

Sec. 474. "Crowners-quest law."—

"1 *Clo.* Is she to be buried in Christian burial, that willfully seeks her own salvation?

[1] Hamlet, Prince of Denmark, Act IV, Scene VII.

[2] Bouvier's Law Dictionary; Stephens, Common Law Pleading.

[3] We find, during the reign of Henry III, Reeves said: "A writ abated, is obtained upon suggestion or falsehood, or the suppression of truth. If the demandant or tenant died, the writ abated, and the action too; but if there were more than one, as parceners, having one right, though the writ abated the action survived. If there was any error in the names of persons, the writ abated." Bracton, 414, b; II Reeve's History Eng. Law, 242.

[4] See *The Law's Delay.*

2 *Clo.* I tell thee, she is; therefore, make her grave straight: the crowner hath set on her, and finds it Christian burial.

1 *Clo.* How can that be, unless she drowned herself in her own defence?

2 *Clo.* Why, 'tis found so.

1 *Clo.* It must be *se offendendo:* it cannot be else. For here lies the point: If I drown myself wittingly, it argues an act: and an act hath three branches; it is, to act, to do, and to perform; Aggal, she drowned herself wittingly.

2 *Clo.* Nay, but hear you, good man delver.

1 *Clo.* Give me leave. Here lies the water; good: here stands the man; good; if the man go to this water and drown himself, it is, will he, nill he, he goes; mark you that: but if the water come to him, and drown him, he drowns not himself: Argal, he, that is not guilty of his own death, shortens not his own life.

2 *Clo.* But is this law?

1 *Clo.* Ay, marry is't; crowners-quest law.

2 *Clo.* Will you ha' the truth on't? If this had not been a gentlewoman she should have been buried out of Christian burial."[1]

By the common law, under what was known as *felonia de seipso*, as a person committed felony in killing another, so he might commit felony in killing himself, and for such intentional killing his goods and lands were forfeited to the crown.[2] But a madman or lunatic could not commit a felony *de seipso*, unless the act was committed during a lucid interval, because no criminal intent could be formed by one unable to distinguish between right and wrong.[3] If a person was drowned, the boat out of which he fell, was appraised and in all cases, the thing that was the *causa mortis* was to be valued and forfeited as a *deodand* to the crown.[4] If the inquisition did

[1] Hamlet, Prince of Denmark, Act V, Scene I.

[2] II Reeve's History Eng. Law, p. 275.

[3] Bracton, 150; *ante idem*.

[4] Bracton, 121, b, 122; II Reeve's History Eng. Law, p. 276.

not find it to be intentional, but sudden or accidental death, however, the result was otherwise; the body that for intentional death was denied Christian burial, was entitled to be buried and the goods or lands of the deceased were not forfeited to the Crown.[1] In all cases of accidental or intentional death, it was the duty of the Coroner to summon all persons who knew anything of the death and investigate and determine as to the cause of the death.[2]

The first Clown, in the above, raises the question of the right of the deceased to Christian burial. The other Clown advises him that the "Crowner," meaning the Coroner, had investigated and decided that she was so entitled. On question again being asked, he again refers to the adjudication at the inquisition. He insists that the death was intentional, because it was knowingly done, and by way of demonstration discriminates between an intentional and an accidental death by drowning, an argument which seems to convince the other Clown, as he concludes that if the deceased had not been a person of consequence, she would have been denied Christian burial.

Sec. 475. Hamlet's legal comments on the skull.—

"*Ham.* There's another: Why may not that be the scull of a lawyer? Where be his quiddits now, his quillets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to knock him about

[1] *Ante idem.*

[2] II Reeve's History Eng. Law, 275, 276.

As Dr. Rolfe shows, in his excellent edition of Hamlet, Sir John Hawkins suspects that Shakespeare intended in this dialogue between the Clowns, to ridicule a case reported by Plowden, in which Sir James Hale had drowned himself in a fit of insanity and the discussion by the Court, in the opinion, was with a view of ascertaining if the death was intentional or accidental, and the statement and arrangement of the propositions were similar to those presented by the Clown, in the above lines. Hales vs. Petit, 1 Plowden, 253.

> the sconce with a dirty shovel, and will not tell him of his action of battery? Humph: This fellow might be in's time, a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries: Is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more?"[1]

While these expressions show a great familiarity with legal terms they are not used as a lawyer would use them. In the first place, no lawyer indulges in such ridicule or sarcasm at the expense of the members of his own profession, nor would he speak of the subtleties, frivolous distinctions, or tricks of lawyers, for he knows that with the average reputable lawyer such things do not exist. Of course striking one's scull with a shovel, would be a battery, in case of a living person and the term is properly used, in this sense. By the statutes merchant, in force in Shakespeare's time, a debtor could be compelled to acknowledge the debt before the chief magistrate of a town, and not only his person held to satisfy the debt, but his lands, as well, until the rents and profits would satisfy the debt.[2] In the course of time these statutes, with the remedies by fine and recoveries, became the ordinary means of acquiring land titles, and on the breach of the conditions subsequent, the titles became indefeasible. By fine and recovery, the conditional title of a debtor proceeded against under the statutes merchant, was barred forever, the fine consisting of an agreement, ratified by the Court, acknowledging all equities as to the land in controversy to have been forever determined and cut off, and the recovery being the judgment of the Court, in such fictitious suit, forever barring

[1] Hamlet, Prince of Denmark, Act V, Scene I.

[2] Tiedeman, R. P. (3d ed.); III Reeve's History Eng. Law, 134.

all claims of the former owner to the land.[1] By voucher, this fiction of an absolute conveyance was made perfect, by the grantor going voluntarily into court and acknowledging his warranty of title to the grantee, after the latter had been fictitiously evicted. A supposed exchange of land of the grantor to the fictitious grantee was made and the premises originally granted were adjudged the absolute property of the grantee, and this recovery was known as a single voucher. By double voucher, the same process was repeated, in court, except that two fictitious tenants were substituted, instead of one and acknowledgment was thus made the more complete by repetition, in this form, by the original grantor, through this additional voucher.[2] While the single voucher reached only the present title of the grantor and operated to divest him, the double voucher was held to cut off all other contingent or possible interests in the land.[3] But as the Poet concludes, the effect of all these conveyances is not sufficient to vest the owner with such a title that he can take it with him when he passes from this life, but the tenures and indentures are all left behind at his death.

Sec. 476. Hamlet's survivorship and disposal of the crown.

"*Ham.* O, I die, Horatio;
The potent poison quite o'er-crows my spirit;
I cannot live to hear the news from England:
But I do prophesy the election lights
On Fortinbras; he has my dying voice;
So tell him with the occurents, more or less,
Which have solicited,—The rest is silence."[4]

It is passing strange, that amid the stirring scenes of this last act in the tragedy, even at the deathbed of his

[1] Tiedeman, R. P. (3d ed.); I Reeve's History Eng. Law, 340, 416.

[2] 1 Bl. Comm. 238.

[3] III Reeve's History Eng. Law, 24.

[4] Hamlet, Prince of Denmark, Act V, Scene II.

mother, Hamlet would remember to dispose of the crown, in a purely legal manner and that the Poet would remember to have him survive the King, so that the crown, in law, would first devolve upon him. As if remembering that the crown must be looked after and the law providing that there could be no inter-regnum, the Poet first killed the king and then the crown descended to Hamlet, and he, in turn, attempted to dispose of it in favor of Fortinbras. The latter asserts his right to the crown in these words:

"Let us haste to hear it,
And call the noblest to the audience.
For me, with sorrow I embrace my fortune;
I have some rights of memory in this kingdom,
Which now to claim my vantage doth invite me."

And to this Horatio replies:

"Of that I shall have also cause to speak,
And from his mouth whose voice will draw on more."[1]

In other words, amid the tragic scenes of this last act, the Poet remembers the legal status of the crown and the necessity of disposing of it in a proper and lawful manner and he does not sacrifice this purely legal question, even for the more stirring scenes of the closing act.

[1] Act V, Scene II.

History does not furnish this close to Hamlet's, or as he was properly called, to Amleth's career. Indeed, modern historians of Denmark, claim that the whole story of Hamlet is a myth; but Müller thinks there is a substratum of fact to the story and according to Saxo-Grammaticus, Amleth, Prince of Jutland, lived in the 2nd century, B. C., and his father was murdered by his uncle, who married his mother and the facts of his life are almost exactly as presented in the play.

CHAPTER XXXVII.

"OTHELLO, THE MOOR OF VENICE."

Sec. 477. Non-suit.
478. Duke's promise to redress Brabantio's wrong.
479. Proof required of Desdemona's seduction.
480. Othello's election to stand upon Desdemona's evidence.
481. Sequestration against Desdemona.
482. Iago the cynic anti-pathetic criminal.
483. Law-days of Courts of Inquiry.
484. Iago's crime against Othello.
485. Proof of guilt "beyond reasonable doubt."
486. False indictment on suborned testimony.

Sec. 477. Nonsuit.—

"*Iago.* . . . But he, as loving his own pride and purposes,
Evades them, with a bombast circumstance,
Horribly stuff'd with epithets of war;
And, in conclusion, nonsuits
My mediators."[1]

A non-suit arises, in an action at law, whenever the plaintiff, rather than finally submit his cause, either to the court or jury, dismisses his action, before the verdict or judgment is rendered.[2] Non-suits are either voluntary, as where the plaintiff absents himself in order to abandon his cause, or involuntary, as where, because of an adverse ruling of the court, or because of some defect in the proceedings, he is compelled to dismiss his action.[3] The application of the term here, is not amiss, for considering the solicitation or suit of the mediators, or citizens who sue for Iago's advancement, as an action at law, Othello, rather than grant their prayer, non-suits them,

[1] Othello, the Moor of Venice, Act I, Scene I.

[2] Bouvier's Law Dictionary.

[3] Bliss, Code Pleading, Nonsuits.

or denies the request and they voluntarily withdraw the application.

Sec. 478. Duke's promise to redress Brabantio's wrong.—

"*Duke.* Whoe'er he be, that, in this foul proceeding,
Hath thus beguil'd your daughter of herself,
And you of her, the bloody book of law
You shall yourself read in the bitter letter,
After your own sense; yea, though our proper son
Stood in your action."[1]

Brabantio had charged that his daughter had been corrupted by medicines and witchcraft, and the Duke promises, for the redress of his wrong, to let the injured father, himself, within the limits of the law, assess the strict letter of the punishment against the offender, even though it be his own son, who had thus offended. Procuring the seduction of an unmarried female by means of medicines, or such like means to take away her consent was equivalent to rape and was punished as a felony, by death of the offender and while by the statute of Edward I, this punishment was assessed at the instance of the party injured, by a later act the punishment was at the suit of the King and the election of the injured person was thus taken away.[2] But the Duke recognized the father's right, in this instance, to assess the punishment the same as though the law permitted it.

Sec. 479. Proof required of Desdemona's seduction.—

"*Duke.* To vouch this, is no proof;
Without more certain and more overt test,
Than these thin habits, and poor likelihoods
Of modern seeming, do prefer against him."[3]

Brabantio had charged that his daughter must have been seduced by witchcraft, medicines or some foul and

---

[1] Othello, the Moor of Venice, Act I, Scene III.

[2] I Reeve's History Eng. Law, p. 461; II *idem.*, pp. 516, 517.

[3] Othello, the Moor of Venice, Act I, Scene III.

occult power, exerted by the Moor, but the Duke advises him that in law some proof or "overt test," must be produced, before the presumption of innocence can be overcome. In this the Duke only gave Othello the benefit of the law, for no one can be convicted of crime on presumptions and conjectures, but proof of the guilt of the accused is always required.[1] The charge of witchcraft was the charge of a criminal offense, during the time of Shakespeare, for not only did Lord Hale recognize the existence of such a fact, in a judgment based upon expert evidence of physicians,[2] but by statute (5 Elizabeth, c. 16) any one practicing witchcraft, enchantment, charm or sorcery, with the intent to provoke anyone to unlawful love, was condemned to suffer imprisonment and the pillory and for a second offence, to be deprived of the benefit of clergy.[3]

Sec. 480. Othello's election to stand upon Desdemona's evidence. —

"*Oth.* I do beseech you,
Send for the lady to the Sagittary,
And let her speak of me before her father:
If you do find me foul in her report,
The trust, the office, I do hold of you,
Not only take away, but let your sentence
Even fall upon my life."[4]

Brabantio's charge against Othello that he had seduced his daughter, by medicines or witchcraft, amounted in law to rape and for this crime the accused, on conviction, was punishable by death.[5] But by the practice which obtained on the trial of such offenses, in the time of

[1] V Reeve's History Eng. Law, 312, *et sub.*
[2] Strickland, Evid., 408; 2 M. & M., 75; 3 Dougl., 157.
[3] V Reeve's History Eng. Law, p. 349.
[4] Othello, the Moor of Venice, Act I, Scene III.
[5] II Reeve's History Eng. Law, 516, 517.

Shakespeare, if the accused elected so to do, he had the right to stand upon the evidence of the "woman in the case," or, as expressed by Glanville, "it was in the election of the person accused, either to submit to the burden of making purgation, or leave it upon the evidence of the woman herself."[1] So it seems in leaving the issue of his guilt to Desdemona's evidence, the Moor invoked his legal right and that he made no mistake, in this course, is demonstrated by the testimony given by Desdemona, which effectually acquitted him of the charge.

Sec. 481. Sequestration against Desdemona.—

"*Iago.* . . . It cannot be, that Desdemona should long continue her love to the Moor,—put money in thy purse;—nor he his to her; it was a violent commencement, and thou shalt see an answerable sequestration."[2]

In English law, sequestration is the process by which the creditor of a clergyman sues out an execution on his judgment and obtains payment of his debt.[3] In ordinary judgments against laymen, a levy is made upon the real estate or personal property of the debtor and same is sold to satisfy the debt; but in the case of a clergyman, the bishop puts in force the law; sequestrators are appointed by him to take possession of the benefice, and to draw the emoluments, after due provision for the continuance of the divine worship.

Iago thus appoints himself the bishop to undertake the sequestration of the object of the Moor's worship, which he promises, by innuendo, to let Roderigo enjoy, by means of this legal process, which he will inaugurate for his benefit.

---

[1] Glanville, *lib.* 14, c. 6; V Reeve's History Eng. Law, p. 462.

[2] Othello, the Moor of Venice, Act I, Scene III.

[3] Bouvier's Law Dictionary.

Sec. 482. Iago the cynic antipathetic criminal.—

"*Iago.* . . . I have told thee often, and I re-tell thee again and again, I hate the Moor: My cause is hearted: thine hath no less reason: Let us be conjunctive in our revenge against him: if thou can'st cuckold him, thou dost thyself a pleasure, and me a sport. There are many events in the womb of time, which will be delivered."[1]

Speaking of Iago as the antipathetic cynic, in crime, Goll says: "In his utterly coarse, ice-cold heart lives only the soul of his own selfishness. What he understands is the selfishness of others, what he does not understand is self-sacrifice. And, as he does not understand it, he denies it; and, not only does he deny it—he hates it, because it is diametrically opposed to his own nature: he hates it because, if he recognized it, he must hate himself, and he cannot hate himself; if he could, he would not be the egoist he is. In the desert of his heart is raised a tower, wherein sits the mephistopheles of his egoism, who, with burning, scorching eyes, watches the ways of men. Wherever he sees active the spirit of dissension, hatred, anger, destruction, his heart expands. Wherever he sees goodness, forbearance, love, and happiness, his heart contracts: and wherever he can, he chops the head off each of them, that it may never blossom again. He does not even covet what one hates. The mold of civilization has never spread itself on the stony ground of his heart. Nature's barren rock, hard and cold and grey, whereon only the very lowest forms of life may thrive, shows itself there. For him, therefore, only the life he sees is real, true, genuine: the life of civilization a detested sham. And, as he hates this life, he also hates all the qualities on which it is based, all that which, for humanity, is the bearer and upholder of civilization. To these cynics Iago belongs."[2]

[1] Othello, the Moor of Venice, Act I, Scene III.

[2] Goll's Criminal Types in Shakespeare, 223, 225. Speaking of the character of Iago, this author elsewhere says: "In Iago we

Sec. 483. Law-days of courts of inquiry.—

"*Iago.* . . where's that palace, where into foul things
Sometimes intrude not? who has a breast so pure,
But some uncleanly apprehensions
Keep leets, and law days, and in session sit
With meditations lawful?"[1]

---

have another type of the criminal by instinct, whose motive is the lust of destruction. He aspires not himself, to become possessed of the treasure, but to rob the possessor of his enjoyment of it, to destroy it for him, to kill his joy in it." (Goll's Criminal Types in Shakespeare, p. 206.)

Explaining the reason for Iago's hatred for his patron, the Moor, and his motive for his criminal conduct, Goll says: "The despised 'thick-lips' thus, suddenly, by the chance of fate, becomes a powerful and, what is much worse, a happy man. Iago's star grows dim: Othello's love-messenger, Cassio, gets the lieutenancy. Thus it becomes clear that Iago no longer is number one, his part is almost played out: the Moor can stand on his own legs; he has won new powerful friends, who can assist him to a much greater extent than Iago. He can now follow his own proud and happy road, without Iago as master. Upon that event vanishes, as if by magic, all Iago's good-will—or rather, lack of ill-will—for the Moor. So long as Iago is able to play the great and superior person, he can pass for a friend. When he becomes the lesser and inferior he is at once turned into an irreconcilable enemy. Othello has reached an elevated position, and what is thus elevated Iago must tear down; where there is human peace and happiness, Iago must sow strife and unhappiness: that is the desire of his heart; therefore the happiness of the Moor must be ruined. But to this common motive of rancour and envy is allied another special motive, which Shakespeare has certainly hidden deep down in the drama, yet no further than it may be found; a motive which indicates the deepest abyss of the human soul." This gifted criminologist then proceeds to show that the cohabitation of Othello with Desdemona and his resulting happiness is the mainspring which arouses all the erotically coloured envy of Iago, and with his natural lust for cruelty, this gives him the impulse to destroy all concerned in the happy state that he sees around him, because he cannot enter the charmed circle. (Goll's Criminal Types in Shakespeare, pp. 228, 229, 237, 239.)

[1] Othello, the Moor of Venice, Act III, Scene III.

In instigating the jealousy of the Moor, Iago in these lines, likens the human mind to a palace, wherein courts of inquiry are held, on proper law days,[1] at regular sessions of such courts, meditations are had upon causes not as pure as those that ought to occupy the mind.

Iago has now commenced to work toward his aim. In the great scene wherein the Poet, with the master's hand—as if familiar with the known depths of the abyss into which Iago enters and all the psychological reasons that prompt him to action—portrays how consummately Iago works upon the mind of Othello until he puts the Moor

"At least into a jealousy so strong
That judgment cannot cure,"

and then he is happy, in the realization of the crime, to which his natural erotic lust of cruelty and envy has led him.

Sec. 484. Iago's crime against Othello.—

"*Iago.* . . . Look to your wife; observe her well with Cassio,
Wear your eye—thus, not jealous, nor secure:
I would not have your free and noble nature,
Out of self-bounty, be abus'd; look to't:
I know our country disposition well;
In Venice they do let heaven see the pranks
They dare not show their husbands; their best conscience
Is not to leave undone, but keep unknown.
Oth. Dost thou say so?
Iago. She did deceive her father, marrying you;
And, when she seem'd to shake, and fear your looks,
She lov'd them most.
Oth. And so she did.
Iago. Why, go to, then;
She that, so young, could give out such a seeming,
To seel her father's eyes up, close as oak,—

[1] Court-leet is the oldest court with criminal jurisdiction; it was a court of record and had power similar to that of the Sheriff's tourn in the county. Dyer, 30b; 4 Bl. Comm. 273.

He thought, 'twas witchcraft:—But I am much to blame;
I humbly do beseech you of your pardon,
For too much loving you.
Oth. I am bound to thee forever."[1]

In thus destroying, for all time, his faith in his wife, Iago here commits the greatest crime that he could against Othello, for as his love for Desdemona exceeded all else on earth, the act of Iago in breaking his faith in her, destroyed his happiness forever. Breach of faith is always the real basis of crime and as the effect of such loss of faith is the more far reaching, nothing could have been more cruel toward Othello than this awakening of his jealousy for his wife, for this was the ruling passion of his life. When the power or possibility of confidence in humanity is killed, society itself is impossible, and as Othello's whole life was bound up in Desdemona, when his confidence in her was gone, his life was wrecked. This was the deliberate aim of Iago and hence shows the greater criminal instinct which he possessed. As observed by Goll,[2] "if humanity itself had occupied the place of Othello, then Iago would be the greatest criminal in the world," for while Brutus killed because of the exalted motive which placed the welfare of his fellows above his own, Iago worked to accomplish the destruction of all about him, from the mere lust of cruelty and envy. And thus the motives of the "creatures of crime," as presented by the immortal genius of Shakespeare, can be best understood with the help of the scientist in criminology.

Sec. 485. Proof of guilt beyond reasonable doubt.—

"*Oth.* Villain, be sure thou prove my love a whore;
Be sure of it, give me the ocular proof;
. . . . . .

---

[1] Othello, the Moor of Venice, Act III, Scene III.
[2] Goll's Criminal Types in Shakespeare, 257, 258.

Make me to see it; or (at the least) so prove it,
That the probation bear no hinge, nor loop,
To hang a doubt on: or, wo upon thy life."[1]

Othello, in these lines, demands proof of the guilt of Desdemona "beyond a reasonable doubt." This is the degree of proof that the law always accords one accused of crime and in demanding proof of her guilt to this extent, the Poet made him merely stand for her legal rights.[2] A presumption of innocence surrounds all those accused of crime, however hardened the criminal may be, and when this rule of evidence would be extended to those accused of the vilest crimes, Othello did not ask too much for the poor innocent wife of his bosom, in invoking this common rule of evidence.[3] In every trial of one accused of crime, the court instructs the jury that if they have "a reasonable doubt" of the guilt of the accused, they should acquit, or, in other words, the prosecution must "so prove it,

That the probation bear no hinge, nor loop,
To hang a doubt on,"

or the proof of the crime is not legally established.

Sec. 486. False indictment on suborned testimony.—

"*Des.* . . . Beshrew me much, Emilia,
I was, (unhandsome warrior as I am,)
Arraigning his unkindness with my soul,
But now, I find, I had suborn'd the witness,
And he's indicted falsely."[4]

Shakespeare here makes Desdemona speak in the language of the law, with the precision of an experienced barrister. As it is always a preliminary to a trial for crime, to arraign the accused, she was "arraigning his

[1] Othello, the Moor of Venice, Act III, Scene III.
[2] Sherwood's Criminal Law; Bishop's Criminal Law.
[3] Greenleaf on Evidence.
[4] Othello, the Moor of Venice, Act III, Scene IV.

unkindness," with her soul giving evidence against him. An indictment is the written accusation of crime against a person, and upon which he is tried by a jury.[1] The indictment is generally returned by a grand-jury, upon the sworn evidence of one or more witnesses. Of course, if the witness was "suborned," or procured to swear falsely, the indictment would be a false charge. So, after reasoning over Othello's unkindness, charged as he was by her soul, Desdemona's supreme love acquitted him, even to the discredit of her own soul, whose evidence she discarded because of her belief in him. It is a beautiful presentation of her love and trust, and the contrast is the more noticeable, because of Othello's lack of confidence in her.

[1] Bishop's Criminal Procedure; 4 Bl. Comm. 302.

CHAPTER XXXVIII.

"VENUS AND ADONIS."

Sec. 487. Judge cannot right his own cause.
488. Law-giver unable to enforce Law.
489. Client wrecked, when attorney mute.
490. Conveyance by seal-manual.
491. Double penalty upon broken bond.
492. Inheritance by next of blood.

Sec. 487. Judge cannot right his own cause.—

". . . . impatience chokes her pleading tongue,
And swelling passion doth provoke a pause;
Red cheeks and fiery eyes blaze forth her wrong;
Being judge in love, she cannot right her cause:
And now she weeps, and now she fain would speak,
And now her sobs do her intendments break."[1]

The Roman goddess of love is here represented in the attitude of a judge, who, because of this position, could not decide the issue between herself and Adonis in her own favor, since a judge cannot adjudicate in his own cause. It is somewhat remarkable that even in delineating the tender passion and while describing the mad passion of the "divine mother of the Roman people," the Poet should use legal phrases, or resort to judicial reference to illustrate his thoughts.

Sec. 488. Law-giver unable to enforce law.—

"Poor queen of love, in thine own law forlorn,
To love a cheek that smiles at thee in scorn."[2]

This verse does not alone present the sad picture of the goddess of love in her total inability to arouse even a spark of affection in the object of her passion, but it does

[1] Venus and Adonis, 217, 222.
[2] Venus and Adonis, 251, 252.

far more. In these two brief lines, Venus, the goddess of love is represented as the law-giver in this greater than human law, in the pitiable condition of being unable to embrace the law she gives the world. While giving love to the world it would indeed be forlorn for the queen of love to bestow her affection upon one who smiled at her in scorn.

Sec. 489. Client wrecked, when attorney mute.—

"An oven that is stopp'd, or river stay'd,
Burneth more hotly, swelleth with more rage:
So of concealed sorrow may be said;
Free vent of words of love's fire doth assuage;
But when the heart's attorney once is mute,
The client breaks, as desperate in his suit."[1]

The heart is here placed in the attitude of a client of the tongue, whose cause must be represented by the latter, as such attorney. Of course if the attorney, whose business is to speak in the interest of his client's cause, remained mute, when he should have spoken, the rights of the client would suffer correspondingly and the suit would be in a desperate strait.

Sec. 490. Conveyance by seal-manual.—

" 'Pure lips, sweet seals in my soft lips imprinted,
What bargains may I make, still to be sealing?
To sell myself I can be well contented,
So thou wilt buy, and pay, and use good dealing;
Which purchase, if thou make, for fear of slips,
Set thy seal-manual on my wax-red lips."[2]

In the time of the Poet the custom of sealing all bargains was given far more prominence in the law than to-day, when seals have been abolished by the statutes of many countries. Seals were then a pre-requisite to

[1] Venue and Adonis, 331, 336.
[2] Venus and Adonis, 511, 516.

all bargains and sales of land or other instruments for the conveyance of land.[1] Most individuals had their own private seals and deeds were made with seals-manual and impressions of wax, and these formulas were indispensable to the validity of such written contracts.

So the art of kissing is likened to the old practice of sealing such contracts, where the lips of Adonis were referred to as the seal to be imprinted in the waxen lips of the goddess, Venus. A deed under the sign-manual of the king, such as were annexed to letters patent, carried absolute verity and as the existence of such an instrument could not be questioned, Venus pleads for such a substantial recognition of her claims.

Sec. 491. Double penalty upon broken bond.—

"A thousand kisses buys my heart from me;
And pay them at thy leisure, one by one.
What is ten hundred touches unto thee?
Are they not quickly told and quickly gone?
Say, for non-payment that the debt should double,
Is twenty hundred kisses such a trouble?"[2]

The goddess of Love in these lines offers to sell her heart for one thousand kisses, on time, under a bond conditioned for the payment, in kind, by Adonis, at his leisuer, one by one. She urges him to the contract that paying them in this way he is out nothing, but ten hundred

[1] II Reeve's History Eng. Law, 54.

In explaining how he was able to counterfeit the King's seal, in forging new orders to the English, as regards Rosencrantz and Gildenstern, Hamlet explains to Horatio that

"I had my father's signet in my purse,
Which was the model of that Danish seal:
Folded the writ up in form of the other;
Subscribed it, gave the impression; plac'd it safely,
The changeling never known." (Act V, Scene II.)

[2] Venus and Adonis, 517, 522.

touches. Like the pleasurable thoughts we think they are quickly told and gone. Then she conditions that if he fail to pay, as agreed, the penalty of the bond shall be doubled—as the obligations of such nature usually run, at common law[1]—and consoles him with the reflection that this double penalty in case of breach of the obligation assumed, would not be very hard on him to pay, in any event. This whole proposition and reasoning is a legal offer and statement of the effect of the breach of the proposal to contract on the terms stated by the Roman goddess of Love.

Sec. 492. Inheritance by next of blood.—

"Here was thy father's bed, here in my breast;
Thou art the next of blood, and 'tis thy right."[2]

Adonis' birth-right is placed as it would be, in law, in case of the descent of real estate, wherein the law would devolve the title on the first-born, or "next of blood." In other words, the goddess of love, goes further back than in mere recognition of the right of Adonis, but characterizes his right as that of descent, through his own father, who had enjoyed the right before him. A right by inheritance is the best title known to the law and this title only devolves upon the "next of blood," so the recognition of the right, on Adonis' part, could not have been by better title.[3]

---

[1] Lawson, on Contracts (3d ed.).
[2] Venus and Adonis, 1183, 1184.
[3] Tiedeman, R. P. (3d ed.).

CHAPTER XXXIX.

"THE RAPE OF LUCRECE."

Sec. 493. Loving against Law and Duty.
494. Pleading for right, in wilderness without Law.
495. Holy human Law.
496. Attestation by Notary.
497. The assault upon Lucrece.
498. Opportunity spurns Right and Law.
499. Justice feasting, while widow weeps.
500. Errors by opinion bred.
501. Wronger wronged by Time.
502. Case past help of Law.
503. Rightful plea for Justice—Denial of.

Sec. 493. Loving against law and duty.—

"I know what thorns the growing rose defends;
I think the honey guarded with a sting;
All this beforehand counsel comprehends:
But will is deaf and hears no heedful friends;
Only he hath an eye to gaze on beauty,
And dotes on what he looks, 'gainst law or duty."[1]

Contemplating the crosses that his attempt upon Lucrece will bring, Tarquin places his will in the attitude of a client, taking counsel from an adviser. His better judgment, before the deed, counsels his will to refrain from such a slaughter of another's right. But his will is deaf to the appeal of his counsel, and, with an eye sole to the beauty of Lucrece, like the thief, who would possess what he longs for, regardless of the infraction of another's rights, he "dotes on what he looks, 'gainst law or duty."

Sec. 494. Pleading for right, in wilderness without law. —

"While she, the picture of true piety,
Like a white hind, under the gripe's sharp claws,

[1] The Rape of Lucrece, 492, 497.

Pleads, in a wilderness where are no laws,
To the rough beast that knows no gentle right
Nor aught obeys but his foul appetite."[1]

It is passing strange that the Poet, even in describing the distress of Lucrece, in her effort to avoid the lust of the debased Tarquin, would think of legal illustrations to express her anguish. In a wilderness without law, it would of course be unavailing to plead to a beast who knew no law, except his own foul appetite, for the recognition of the "gentle right," since the right is recognized only where the law abides. Like the frail beast which is powerless in the embrace of the mighty one that hunger leads by natural law to destroy the weaker, the poor Lucrece is powerless in her pleading, for the recognition of the right can find no lodging place in a bosom as debased as that of Tarquin. The adherence to the rules of conduct prescribed for the recognition of the others' rights, and the use of our own in such manner as not to cause injury to others in their own, is what distinguishes civilized man from the beasts of the wilderness who know no law, but that of the claw and fang; and to this latter class is Tarquin properly likened.

Sec. 495. Holy human law.—

"She conjures him by high almighty Jove,
By knighthood, gentry, and sweet friendship's oath,
By her untimely tears, her husband's love,
By holy human law and common troth
By heaven and earth and all the power of both,
That to his borrow'd bed he make retire,
And stoop to honor, not to foul desire."[2]

The veneration for law, which this verse evidences, is characteristic of the great Shakespeare, at all times. Appealing first, in the name of the great Jove, then to his chivalry, his family, the friendship of her husband, her

[1] The Rape of Lucrece, 542, 546.
[2] The Rape of Lucrece, 568, 574.

own tears, and her husband's love, as a final appeal, she places her right to exemption from his lecherous embrace, upon the "holy human law," which, in all civilized countries, protects the husband's right to the affection and society of his wife. Upon this protection of the home the strongest laws of society are based, for without protection of the domestic relations, mankind becomes but little better than beasts of the field. The law so far protects the happiness and sacredness of the home that anyone who destroys such happiness is both civilly and criminally liable and to such an extent is the society of the wife recognized, as a property right of the husband, that for any alienation of her affection, he is given a cause of action, at law.[1]

Sec. 496. Attestation by notary.—

"O comfort-killing Night, image of hell:
Dim register and notary of shame."[2]

A notary is an officer known to the civil law of Rome as *tabellio forensis*.[3] In England this officer was appointed by the archbishop of Canterbury and his duties were to take and administer oaths and affirmations; to attest the execution of legal instruments and certify to contracts and other documents generally.

Frantic with grief, Lucrece expresses her spite, and compares the night of her undoing to a notary, which with seal and commission attested or bore witness to her shame, so that it would be known to all men. It is a pitiful scene which the Poet depicts in this and succeeding verses, by comparing night to this somber officer of the law, responsible for the "cureless crime" against Lucrece.

---

[1] Schouler's Domestic Relations.
[2] The Rape of Lucrece, 764, 765.
[3] Bouvier's Law Dictionary.

Sec. 497. The assault upon Lucrece.—

"If, Collatine, thine honor lay in me,
From me by strong assault, it is bereft."[1]

An assault is an attempt to inflict bodily injury upon another, coupled with a present intent to carry such attempt into execution.[2] Battery is the consummation of the assault, or the actual infliction of threatened violence.[3]

Assaults with the intent to commit a rape, such as the assault by Tarquin upon Lucrece, in the domain of criminal law, are known as the most aggravated forms of assault, and are followed by the most severe punishment. In other words, as reflected by the wronged Lucrece, her husband's honor was bereft of her by "strong assault," but it is strange that the Poet would have this wronged woman bewail her fate in the use of such legal terms.

Sec. 498. Opportunity spurns right and law.—

"Opportunity, thy guilt is great:
'Tis thou that executest the traitor's treason;
Thou set'st the wolf where he the lamb may get;
Whoever plots the sin, thou point'st the season;
'Tis thou that spurn'st at right, at law, at reason;
And in thy shady cell, where none may spy him,
Sits Sin, to seize the souls that wander by him."[4]

This personification of Opportunity, as the accessory to treason and the executor of such dire crimes, as to render the guilt of Opportunity so apparent, is of course a forced conclusion, to carry out the idea of the Poet's thoughts, for the same reasoning could be urged to show that Opportunity was the blessing of the innocent and the means of obtaining and carrying out philanthropy, charity and beneficence. But of course in the way in

[1] The Rape of Lucrece, 834, 835.
[2] Cooley on Torts.
[3] *Ante idem.* Bouvier's Law Dictionary.
[4] The Rape of Lucrece, 876, 882.

which it is used the word is susceptible of the construction and meaning given it by Shakespeare, for those who plan crime, must await the opportunity to carry it out and embracing the opportunity to commit crime, of course does constitute opportunity, as the means by which it is accomplished, in part responsible for the crime committed, so in this sense it can be said to spurn "at right, at law, at reason." But the thought that Sin, sitting in the shady cell of Opportunity, awaiting to "seize the souls that wander by him," so links up Opportunity with Sin, in furnishing an abiding place and harboring him, that this use of the word can only be justified under the plea of poetic license, or the diseased reflections of the wronged Lucrece.[1]

Sec. 499. Justice feasting while widow weeps.—

"The patient dies while the physician sleeps;
The orphan pines while the oppressor feeds;
Justice is feasting while the widow weeps;
Advice is sporting while infection breeds."[2]

Bewailing her fate and the opportunity which led Tarquin to accomplish her ruin, the poor Lucrece sees only the bad effects of opportunity and instead of cursing alone the criminal intent and bad motives of Tarquin, she personifies Opportunity to upbraid it, as the friend of the opulent and powerful alone. She laments that the humble suppliant sues in vain, for on these, as she views her own sad lot, Opportunity turns a deaf ear. The orphan pines while the oppressor feeds. "Justice is feasting while the widow weeps; advice is sporting while infec-

[1] Following up this reasoning, she is made to complain further of Opportunity, in the next verse, as follows:

"Thou makest the vestal violate her oath;
Thou blowest the fire when temperance is thaw'd;
Thou smotherest honesty, thou murder'st troth;
Thou foul abettor: thou notorious bawd." (883, 886.)

[2] The Rape of Lucrece, 904, 907.

tion breeds." This, of course, is misanthropy, but under the circumstances it could not be presumed that Lucrece would view the world through the transparent glasses of a beneficent philosophy, but the crimes against the weak and down-trodden would naturally be magnified by the unequal gloss of her horoscope, superinduced by her forced misery.

Sec. 500. Errors by opinion bred.—

"Time's office is to fine the hate of foes,
To eat up errors by opinion bred,
Not spend the dowry of a lawful bed."[1]

After lamenting that Time, through his servant Opportunity, had chained her to an "endless date of never-ending woes," Lucrece then reflects that this is not the proper office of Time, but in its natural effect it ends the hate of foes, eats up "errors by opinion bred," without spending the dowry of a lawful bed. Shakespeare elsewhere refers to erroneous opinions, "recorded for a precedent," and sagely philosophizes how, when this is done, "many an error, by the same example, will rush into the state."[2] This is the logical conclusion of a lawyer, from the premise given, for it is the experience of mankind, based upon a similar state of facts. The "dowry of a lawful bed" is the right to the undivided society and love of the wife, which Lucrece complains that Time and Opportunity have taken from the lawful possessor.

Sec. 501. Wronger wronged by time.—

"Time's glory is to calm contending kings,
To unmask falsehood and bring truth to light,
To stamp the seal of time in aged things,
To wake the morn and sentinel the night,
To wrong the wronger till he render right."[3]

---

[1] The Rape of Lucrece, 936, 938.

[2] Merchant of Venice, Act IV, Scene I.

[3] The Rape of Lucrece, 939, 943.

Emerson heard a sermon by a minister whose orthodoxy led him to conclude that the good must be miserable on this earth; that the righteous judgment was not executed here, but the wicked would continue successful, until the Last Judgment. This reminded him of the fallacy of this argument and he wrote his essay on "Compensation." Shakespeare grasped this great truth, centuries before Emerson wrote, and in these lines he placed in the mouth of the wronged Lucrece the same philosophy. He knew, with Emerson, that "the specific stripes may follow late after the offense, but they follow, because they accompany it." He also realized that "crime and punishment grew out of one stem."[1] He places the same wisdom in the mouth of Lucrece that prompted the great Emerson to conclude that "every act rewards itself" and with the aid of Time, "men call the circumstance the retribution," which is often spread over a long time. Like the impression on the wax placed on legal documents, Time stamps its seal on aged things and "Time's glory" is to "wrong the wronger till he render right." Time will not only punish him, by making him suffer, as he makes others suffer,[2] but by the fixed law of compensation, wrong him, "till he render right," or make full and adequate restitution.

Sec. 502. Case past help of law.—

"Out, idle words, servants to shallow fools:
Unprofitable sounds, weak arbitrators:
Busy yourselves in skill-contending schools;
Debate where leisure serves with dull debaters;
To trembling clients be you mediators:
For me, I force not argument a straw,
Since that my case is past the help of law."[3]

[1] Emerson's Essay, Compensation.

[2] This is Doctor Rolfe's interpretation of these words, "Wrong the Wronger." (See Rolfe's Venus and Adonis, p. 242.)

[3] The Rape of Lucrece, 1016, 1022.

Lucrece, in these lines, concludes that when the heart is so full of contending emotions as she then suffers, mere words are too weak arbitrators for her case. Words are all right for dull debaters, or scholars, in the debates of the school-room, but not for cases like hers! Words would be adequate mediators for a dubious, trembling client; but not for one who had lost all he had and who had no more to lose. Like one in this position, whose rights had been so outraged that he had nothing more to lose, the law could furnish him no remedy, for he would have a case that would be "past the help of law."[1]

Sec. 503. Rightful plea for justice—Denial of.—

"My bloody judge forbade my tongue to speak;
No rightful plea might plead for justice there:
His scarlet lust came evidence to swear
That my poor beauty had purloin'd his eyes;
And when the judge is robb'd the prisoner dies."[2]

The adoption, by the Poet, of the comparison of Tarquin with a judge, who would not let a plea for justice be entered, in the narration of the story of her wrong to her husband, by Lucrece, is an apt illustration of the frequent use of legal terms, by Shakespeare, to make the more impressive the solemnity of the scene he describes. A judge who would refuse to let a plea for justice be entered, would of course be a most unjust judge. Add to

[1] In narrating her shame and the causes thereof to her husband and his friends, Lucrece concludes:

. . . "'tis a meritorious fair design
To chase injustice with revengeful arms:
Knights, by their oaths, should right poor ladies' harms.
(1692-4.)
. . . . . .

The help that thou shalt lend me comes all too late, yet let the traitor die;
For sparing justice, feeds iniquity." (1685, 1687.)

[2] The Rape of Lucrece, 1648, 1652.

this, a judge who admitted his lust alone to prompt him to a conclusion as the only witness whose evidence he would receive, and if Tarquin could properly be likened to the incumbent of the judgment seat, this is a proper picture to draw of him. His lust had convinced him that he was blind with love for Lucrece. All the attributes of the judge were thus taken from him and of course no justice could be meted out to the prisoner.

CHAPTER XL.

"SONNETS."

Sec. 504. Determination of lease.
505. Improper to praise by hearsay.
506. Adverse party for advocate.
507. Trial between Eye and Heart—Jury of Heart's tenants.
508. No cause alleged against lawful reason.
509. Grant failing for want of consideration.
510. Forfeiture of limited lease.
511. Forfeiting mortgaged property.

Sec. 504. Determination of lease.—

"Against this coming end you should prepare,
And your sweet semblance to some other give.
So should that beauty which you hold in lease
Find no determination."[1]

In urging that posterity is the only avoidance of death, the Poet here uses legal terms pertaining to a tenancy for years to illustrate to beauty the necessity of procreation to prolong the term of years.

"Since sweets and beauties do themselves forsake
And die as fast as they see others grow,"

it is suggested in these lines that the proper preparation ought to be made to prevent the coming end, so that the beauty which is given for a determinate term of years only, may be lengthened into a term without end or determination.

When real estate is demised for a term of years it is called a lease, in law, and the end of the leasehold or tenancy is said to be the termination of the tenancy.[2]

---

[1] Sonnets, XIII, 3, 6.

[2] Tiedeman's R. P. (3d ed.); Taylor's Land. & Ten.

In the XVIII' Sonnet, it is said:

"Rough winds do shake the darling buds of May,
And summer's lease hath all too short a date." (3, 4.)

Sec. 505. Improper to praise by hearsay.—

"O, let me, true in love, but truly write,
And then believe me, my love is as fair
As any mother's child, though not so bright
As those gold candles fix'd in heaven's air:
Let them say more that like of hearsay well;
I will not praise, that purpose not to sell."[1]

After first promising that nothing but the truth will be expressed, as to his "love," the Poet affirms, on the best evidence, as to things actually known, that he is as fair as any mother's son, though not so bright as the fix'd stars of heaven. He will not affirm anything of his love, by secondary or hearsay evidence, but those who prefer hearsay to actual facts, could say much more. No painted rhetoric or hearsay evidence are needed to add color to the description given by the actual facts concerning the subject referred to. Things for sale require such praise, but not those things that are not intended for the market.

As hearsay evidence is incompetent in all legal proceedings[2] and opinions are only admissible by experts, or those possessing skill or experience in a given transaction, the reference in these lines to the rule requiring the best evidence of which the subject is susceptible, seems apparent.

Sec. 506. Adverse party for advocate.—

"For to thy sensual fault I bring in sense—
Thy adverse party is thy advocate—
And 'gainst myself a lawful plea commence."[3]

An advocate is generally defined as the "patron of a cause," though it does not appear that the patrons called in at Rome to assist the cause of their clients were called by this name. The term *Advocatus,* in the time of Cicero, was not applied to the patron or orator who assisted in the

[1] Sonnets, XXI, 9, 14.
[2] Greenleaf on Evidence (14th ed.).
[3] Sonnets, XXXV, 9, 11.

cause in public, but rather as the etymology of the word would indicate, to the one *called in* to assist at the trial of the cause.[1]

"Sense," judgment or reason, is "called in" or brought in, as it were, as the advocate of the sensual one, and in this cause, sense is the adverse party to the sensual one, for whom this advocate appears and at once enters a "lawful plea" against Shakespeare. In the use of the term Advocate, the Poet uses it as it was understood at Rome, for an advocate was not the orator who pleaded in the cause, but was only called in to assist at the hearing, and in admitting that such an advocate could urge a lawful plea against himself, the Poet practically confessed the weakness of the client for whom "sense" or reason was called into the cause.

Sec. 507. Trial between eye and heart—jury of heart's tenants.—

"Mine eye and heart are at a mortal war,
How to divide the conquest of thy sight:
Mine eye my heart thy picture's sight would bar,
My heart mine eye the freedom of that right.
My heart doth plead that thou in him dost lie,
A closet never pierced with crystal eyes,
But the defendant doth that plea deny,
And says in him thy fair appearance lies.
To 'cide this title is impaneled
A quest of thoughts, all tenants to the heart;
And by their verdict is determined
The clear eye's moiety and the dear heart's part:

---

[1] Ulpian, Dig. 50, *tit.* 13; Tacitus, *Annal.* X. 6.

After making this confession of sensuality, the Poet in the next two lines, admits that he experiences contending emotions over the fact

"That I an accessory needs must be
To that sweet thief which hourly robs from me." (13, 14.)

But in the XL, Sonnet, he concludes that

"I do forgive thy robbery, gentle thief,
Although thou steal thee all my poverty." (9, 10.)

As thus; mine eye's due is thine outward part,
And my heart's right thine inward love of heart."[1]

This sonnet illustrates the custom of the Poet to illustrate his thoughts with legal proceedings, which ever seemed at his command. In these lines is presented the whole array of legal procedure, in a cause between the eye and heart, as contending parties, over the right to the image of the Poet's friend, including the pleas filed, the impaneling of a jury and the return of the verdict.

The eye contended that the heart had no right to the image, while the heart denied the eye the freedom of the sight of the friend. The heart asserted the better title to the picture, while the eye denied the plea. To decide the title, a jury were impannelled, being the tenants of the heart, who, of course would be prejudiced jurors. By their verdict, which in the orderly course of such legal proceedings, would follow the pleas offered by the rival parties, it was decided that the eye was entitled to the outward vision, while the heart was vested with the inward love of the heart of his friend. From the entering of the plea, denied by the defendant, to the return of the verdict, this Sonnet shows a wonderful familiarity with legal proceedings in court, and follows the natural order of a trial, at law.[2]

Sec. 508. No cause alleged against lawful reason.—

"Against that time when thought shalt strangely pass,
And scarcely greet me with that sun, thine eye,
When love, converted from the thing it was,
Shall reasons find of settled gravity;
Against that time do I ensconce me here
Within the knowledge of mine own desert,

[1] Sonnets, XLVI, 1, 14.

[2] It is surprising that Sewell (2d ed.) and Wyndham, should conclude that "'cide" was equivalent to "side," meaning that the jury would determine between the one side or the other, for the term clearly is a contraction of the word "decide," which is the very province of a jury, impannelled as this jury was.

And this my hand against myself uprear,
To guard the lawful reasons on thy part:
To leave poor me thou hast the strength of laws,
Since why to love I can allege no cause."[1]

The Poet looks forward to the time when his friend Southampton will be separated from him, for the latter's failure to dedicate poems to him, instead of dramas for the multitude. But the reflection that he is still true and loyal to his friend and his own conscience will comfort Shakespeare when this time comes. If lawful reasons are urged on his part, the Poet will raise his hand, even against himself, to enforce the rights of his friend, since his cause has the strength of the law, while Shakespeare has no right to love him. When law is on one's side a good cause of action can always be alleged, but when no legal reasons can be given, it is impossible to set forth a good plea, in law. This is the conclusion reached in this Sonnet.

Sec. 509. Grant failing for want of consideration.—

"For how do I hold thee but by thy granting?
And for that riches where is my deserving?
The cause of this fair gift in me is wanting,
And so my patent back again is swerving."[2]

A patent is an exclusive right, granted by an official document securing to the grantee the exclusive privilege to the thing granted, as a patent to land, by the Government.[3]

To constitute any valid grant, based upon a valuable consideration, there must be existing such consideration and if the consideration is wanting, the grant would fail.[4] The Poet intends to illustrate, by the use of the legal grant that the loss of his friend's love is owing to the fact that

[1] Sonnets, XLIX, 5, 14.
[2] Sonnets, LXXXVII (5, 8).
[3] Bouvier's Law Dictionary.
[4] Tiedeman's R. P. (3d ed.).

the consideration of the grant from himself has failed, because he is wanting in the personal charms and gifts necessary to hold his love.

Sec. 510. Forfeiture of limited lease.—

"Not mine own fears, nor the prophetic soul
Of the wide world dreaming on things to come,
Can yet the lease of my true love control,
Supposed as forfeit to a confined doom."[1]

These lines clearly refer to a conditional or determinate lease of realty, which is a contract between the lessor and the lessee, for the possession of land, for a fixed or determinate period, for a certain consideration, to be void, or forfeited, on the breach of some certain condition.[2] The Poet had considered his love, formerly possessed, forfeited and ended, by Southampton's confinement in the Tower, but on the death of Elizabeth, the supposedly forfeited lease or tenancy of his friend's love, becomes again a vitalized, live estate, subject to no limitations or forfeiture, in law.

Sec. 511. Forfeiting mortgaged property.—

"So, now I have confess'd that he is thine
And I myself am mortgaged to thy will,
Myself I'll forfeit, so that other mine
Thou wilt restore, to be my comfort still."[3]

This verse clearly refers to the confinement of Southampton in the Tower and the former verse expresses the Poet's desire to be permitted to go his bail, by substituting

---

[1] Sonnets, CVII (1, 4).

[2] White, Mines & Mining Remedies, Chap. XI.

In the CXXV, Sonnet the same kind of a limited lease is referred to, in these lines:

"Have I not seen dwellers on form and favor,
Lose all and more, by paying too much rent?" (5, 6).

[3] Sonnets, CXXXIV (1, 4).

his own person for that of his friend, in jail. A mortgage is the temporary pledging of land in security for a debt due the mortgagee, by the mortgagor.[1] The land itself, not being susceptible of a manual delivery, the mortgagee holds the mortgage as an evidence of his right to the land as security for his debt, until it is paid. The only way to create a mortgage in early times, was to give livery of seisin of the freehold estate, thus passing the estate to the mortgagee. On breach of the condition of the mortgage, to pay the debt, the estate was forfeited and became the absolute property of the mortgagee. And the Poet here proffers to forfeit himself as security for his friend, recognizing that the condition of the obligation is broken

[1] Tiedeman, R. P. (3d ed.).

INDEX.

References are to Sections.

A

Abatement, pleas in, 473.
Abstract and brief, 179.
Accessory before the fact, 315.
Accomplice, 'peaching on, 219.
Accomplices, 233.
Accused, acquittal of, 314.
Accuser and accused, 188.
Accusing counselor, 354.
Accusing one face to face, 353.
Acquittal, of accused, 314.
Acquittances, 73.
Act distinguished from intent, 35.
Acting as both judge and juror, 355.
Action, 238.
Action of battery, 17.
Action of slander, 23.
Action on the case, 155.
"Action-taking" knave, 448.
Acts by attorneys, 114.
Acts of Parliament, 305.
Adjournment of court, 344.
Admission against interest, 11.
Adultery, 256.
Adversaries at law, 128.
Adverse party for advocate, 206.
Advocate, 417.
Advocate, adverse party as, 506.
"A friend i' the court," 244.
Agent, 161.
Agreement, articles of, 276.
Alias, 390.
Alien, 227.
Amercement by fine, 457.
Ancestors, 253.
Answer, 213.
Answering public laws, 387.
Antipathetic criminal, Iago, the, 482.
Antonio's confession of the bond, 94.
Antony's suicide, *felo de se*, 415.
Antony's tribute to Brutus' character, 409.
Apparitors, duties of, 74.
Appeal by king's ring, 357.
Appeal, motion to dismiss, 342.
Appearance in court, 340.
Appellant, 187.
Applying judgment to Judge, 441.
Apprehend in the fact, 283.
Apprentice, term of, 222.
Appurtenances, 467.
Arbitration, 175.
Arraignment of Hermione, 143.
Arrest, 152.
Arrest on mesne process, 154.
Arrest upon "hue and cry," 223.
Arrested in the act, 148.
Articles of agreement, 276.
Assault upon Lucrece, 497.
Assurance, security, 234.
Assurance, settlement by way of, 132.
Athenian law, jurisdiction of, 53.
Athenian law, parent's right of infanticide under, 55.
Attachment, 151.
Attainder, 62.
Attestation, 362.
Attestation by notary, 496.

References are to Sections.

Attestation by sight and hearing, 372.
Attorney, loyalty of, 34.
Attorneys, 207.
Attorneys, acts by, 114.
Attorney-general, 199.
Audi alteram partem, 221.
Avouch, 316.

B

Bail, 300.
Bail in criminal case, 429.
Bankrupt, 109.
Bargain and sale, 277.
Bastard, disinheriting, 172.
Bastard's right of inheritance, 169.
Battery, action of, 17.
Battle, trial by, 191.
Bawds not competent witnesses, 384.
Bearing false witness, 291.
Bearing testimony, 262.
Be it known by these presents, 108.
Bencher, 392.
Benefit of clergy, 297.
Benefit of sanctuary, 324.
Bequest, 105.
Bier, ordeal of, 312a.
Bigamy, 326.
Bill of lading, 437.
Bills against ecclesiastics, 249.
Biting statutes, 295.
Boiling in oil, torture by, 146.
Bond, 86.
Bond, Antonio's confession of, 94.
Bond, breach of, 80.
Bond to keep peace, 454.
Bondman, 280.
Bourn, 410.
Brabantio's wrong, Duke's promise to redress, 478.
Brawl, 268.
Breach of bond, penalty for, 80.
Breach of peace, 39.
Breach of promise, 36-153.
Breaking laws, 205.
Bribes, 289.
Brief and abstract, 179.
Broken bond, double penalty on, 491.
Broker, 228.
Brutus' crime, idealism the basis of, 400.
Brutus' murder, people's cause the motive for, 404.
Brutus' struggle with his conscience, 403.
Buckingham's trial for treason, 334.
Burglary, preliminary examination for, 48.

C

Cæsar's will, 407.
Cannon of the law, 178.
Capital crimes, 257.
Case, lawyer's duty to understand, 419.
Case past help of law, 502.
Cassius' suggestion of the crime, 402.
Cassius, the typical criminal revolutionist, 401.
Cause alleged against lawful reason, 508.
Challenging prejudiced judge, 338.
Charter, 90.
Chattels, 133.
Child begot when father not *in tra quatuor maria*, 170.
Child born in prison, 141.
Child, status of under Greek law, 54.

References are to Sections.

Child's marriage, parents' consent to, 57.
Children, law of, 405.
Client wrecked when attorney mute, 489.
Clothing villainy with holy writ, 318.
"Come into court," 335.
Comitia, trial by, 398.
Commission for office, 347.
Commitment for contempt of court, 245.
Commitment to jail, 142.
Common, 70.
Common, land held in, 293.
Common-law marriage contract, 29.
Commutation of punishment, 101.
Complaint, 391.
Compounding crime, 129.
Compromise, 275.
Compromising slanders, 7.
Concubine, 307.
Condemned woman's privilege of pregnancy, 274.
Condition of wager contract, 418.
Confession, 50.
Confession of guilt, 33.
Confirmation, title by, 302.
Confiscation of property, 1.
Consanguinity, 370.
Consideration, grant failing for want of, 509.
Conspiracy, 216.
Constable, qualifications of, 42.
Contempt of court, 6-245.
Contempt, prosecution for, 433.
Contract, 270.
Contract of marriage, 3.
Contrary to form of law, 287.
Controversy, judgment on, 167.
Conveyance by seal-manual, 490.
Conveyance in use, 102.
Conviction, death without lawful, 322.
Copyhold, 165.
Corrupted justice, 330.
Counsellor, 472.
Count, extra judicial confession on, 50.
Counterfeit, 231.
Course of law, 85.
Court, adjournment of, 344.
"Court, a friend i' the," 244.
Court, appearance in, 340.
Court, contempt of, 6.
Court, Inns of, 241.
Court, issue before, 91.
Court-leet, 127.
Court, sessions of, 337.
Court, vacations of, 112.
Courts of inquiry, law days of, 483.
Covenant, 204.
Craving the law, 97.
Crime, compounding, 129.
Crime, motive for, 258.
Crime of perjury, 71.
Crime, the basis of Richard's character, 310.
Crimes, 214.
Crimes unwhipped by justice, 449.
Criminal case, standing mute in, 209.
Criminal instinct, development of, 436.
Criminals, identification of by picture, 447.
"Crowner's-quest law," 474.
Custom, shaping laws, 21.
Cynics views of law, 383.

D

Damage and indemnity of war, 363.

References are to Sections.

Day of trial, 212.
Dead laws, 20.
Death by judicial sentence, 232.
Death by the wheel, 397.
Death penalty for homicide, 374.
Death without lawful conviction, 322.
Debtor overpassing bound, 423.
Debtor's dungeon, 154.
Decree of divorce from Katherine, 349.
Decrees, 60.
Deed, label to, 461.
Deed of gift, 103.
Defending manslaughter, 379.
Demesne lands, 424.
Demise, 329.
Departments of Government working harmoniously, 255.
Deposing, according to law, 190.
Descent, 120.
Descent to eldest son, 168.
Desdemona, sequestration against, 481.
Desdemona's evidence, Othello's election to stand upon, 480.
Desdemona's seduction, proof required of, 479.
Detecting crime, 468.
Determination of lease, 504.
Determining causes, 298.
Development of criminal instinct, 436.
Dilatory pleas, 343.
Disinheriting bastard, 172.
Disinheriting heir, 303.
Disputing with lunatic, 317.
Distraining property, 265.
Divesting property, 260-443.
Divine law against murder, 323.
Divorce, 125.
Double penalty on broken bond, 491.
Dowry, 66.
Duchess of Gloster's sentence, 285.
Duke's promise to redress Brabantio's wrong, 478.
Duties of solicitor, 67.
Duties of the night watch, 43.
Dying declarations, 193a.

E

Earnest to bind bargain, 150.
Eating flesh contrary to law, 239.
Ecclesiastics, Henry V's favor toward, 250.
Ecclesiastics, laws against, 249.
Effect of error, 408.
Effect of legal precedent, 99.
Egress, right of, 8.
Election to act in given way, 416.
Elizabeth's plea of sanctuary, 311.
Encroachment on Prince's right, 427.
Endowment, 38.
Enfeoffment, 226.
Enfranchising one, 75.
Entailed property, 123.
Entailment of estate, 444.
Equal rank in trial by battle, 453.
Equality of justice, 31.
Equity, 177.
Errors by opinion bred, 500.
Estate, 158.
Estate, entailment of, 444.
Estate tail upon condition, 304.
Evidence, 124.
Evidence by interested party, 471.
Evidence, extorting on rack, 82.
Examination before magistrate, 46.
Examining justice, 115.

References are to Sections.

Exceptions, 10.
Execution, 159.
Execution of contract by parties interchangeably, 368.
Executioner, 292.
Executors, 208.
Extendi facias, writ of, 111.

F

Factor, broker, 228.
Failure to speak in criminal case, 209.
"Faitors," 240.
False imprisonment, 44.
False indictment on suborned testimony, 486.
False testimony, 51.
Falstaff's commitment to prison, 247.
Fee, pleading for, 56.
Fee-simple, 9.
Fee-farm, kiss in, 367.
Fees, of prisoners, 138.
Felo de se, 415.
Felon in irons, 381.
Fighting in King's palace or presence, 272.
Fine, 202.
Fine, amercement by, 457.
Fine and recovery, 9.
Forfeiters, 421.
Forfeiting mortgaged property, 511.
Forfeiture of lands, 110.
Forfeiture of limited lease, 510.
Forfeiture, plea of, 84.
Forgeries, 466.
Frailty of laws, 22.
Frankleyn, 422.
Fratricide, 470.

G

Gift, deed of, 103.
Goddess of Justice abandoning earth, 431.
Goneril, imaginary trial of, 452.
Grand jury, 15-220.
Grant failing for want of consideration, 509.
Greek law, parent and child under, 54.
Guiderius' defense of his crime, 425.
Guilt, confession of, 33.
Guilty conscience, 320.

H

Hamlet's legal comments on the skull, 475.
Hamlet's survivorship and disposal of the crown, 476.
Hand and seal, 341.
Hearsay, praising by, 505.
Heir, 106.
Henry V's favor toward ecclesiastics, 250.
Hereditary taints, 376.
Heresy, 356.
Hermione, arraignment of, 143.
Holy human law, 495.
Homage, 1.
Homicide, 264.
Homicide, death penalty for, 374.
Householder, 47.
"Hue and cry," arrest upon, 223.

I

Iago, the cynic antipathetic criminal, 482.
Iago's crime against Othello, 484.
Idealism the basis of Brutus' crime, 400.

References are to Sections.

Identifying criminals by pictures, 447.
Imaginary trial of Goneril, 452.
Impeachment, 117-189.
Impounding strays, 254.
Impressment for military service, 361.
Improper conduct, exceptions to, 10.
Incest, 435.
Intra quatuor maria, child begot when father not, 170.
In manner and form, 64.
Indemnity of war, 363.
Indenture, 180.
Indictment, 145.
Infamy, 236.
Infanticide, parent's right of, by Athenian law, 55.
Inheritance, 66.
Inheritance, bastard's right of, 169.
Inheritance by next of blood, 492.
Inns of court, 241.
Instigation of Macbeth's crime, 160.
Insurrectionary bills, 248.
Inter-regnum, 301.
Intent distinguished from act, 35.
Interrogatories, 182.
Inventory, 346.
Invoking justice from Heaven, 430.
Issue before the court, 91.
Italian law against sale of poison, 462.

J

Jail, commitment to, 142.
Joint and corporate action, 375.
Jointure, 113.
Jourdemayn, case of Margery, 278.
Judge cannot right own cause, 487.
Judge, challenging prejudiced, 338.
Judgment applied to Judge, 441.
Judgment, plea for, 95.
Judgment, Portia's, on the bond, 100.
Judgment, unreversed, 4.
Judicial sentence, death by, 232.
Jurisdiction of Athenian law, 53.
Jurisdiction regal, 296.
Jury of heart's tenants, 507.
Jury system, frailty of, 22.
Justice abandoning earth, 431.
Justice, equality of, 31.
Justice feasting while widow weeps, 499.
Justice, modesty of, 442.
Justice of Shylock's plea, 96.
Justice, plea for, 30.
Justice residing between right and wrong, 360.
Justice, scales of, 52.
Justicer, 426.
Justification of one condemned by law, 286.

K

Keeping the peace, 185.
"King can do no wrong," 406.
King, guardian of heirs of fortune, 116.
King's prerogative, 140.
King's presence, fighting in, 272.
King's right to prisoner under military law, 217.
Killing in self-defense, 380.
Kiss in fee-farm, 367.

L

Label appended to deed, 461.
Laborers and mechanics, statutes of, 399.

References are to Sections.

Lady Grey's suit for husband's lands, 306.
Land held in common, 293.
Landed 'squire, 173.
Landlord, 195.
Lands, forfeiture of, 110.
Law, a gazing stock, when not enforced, 32.
Law, adversaries at, 128.
Law, against eating flesh, 239.
Law and heraldry, 464.
Law, contrary to form of, 287.
Law, course of, 85.
Law, craving the, 97.
Law, cynic's views of, 383.
Law days of courts of inquiry, 483.
Law giver unable to enforce law, 488.
Law is strict, 382.
Law, jurisdiction of Athenian, 53.
Law, limitation of, 58.
Law no respector of persons, 246.
Law of children, 405.
Law of God and man, 313.
Law, penalty of, 61.
Law, pity the virtue of, 377.
Law, plunging into, 378.
Law, poor man's right in, 438.
Law, prostitution before, 24.
Law, standing for, 87.
Law, terms of, 19.
Law, time overthrows, 135.
Law, windy side of, 16.
Lawful act, 121.
Lawful killing, not murder, 434.
"Law's delay," 218.
Laws, frailty of, 22.
Laws of land service, 237.
Laws, protection of marital relation, 364.
Law's redress of wrongs, 184.
Laws, shaped by custom, 21.
Laws, that are dead, 20.
Lawyer's duty to understand case, 419.
Lawyer's points, 147.
Lease, determination of, 504.
Lease, forfeiture of limited, 510.
Lease, tenement, 196.
Leaving property in use, 411.
Legitimacy of child born during wedlock, 171.
Lent, law against eating flesh during, 239.
Lent, sales of meat during, 294.
Letters-patent, 200.
Levitical law against niece marrying uncle, 327.
Levying sums of money, 288.
Lex terra salica explained, 252.
Libelling the senate, 432.
Life tenure, sale of, 456.
Limitation of municipal law, 58.
Litigious peace, 439.
Livery, 206.
Loving against law and duty, 493.
Loyalty of attorney, 34.
Lucrece, assault upon, 497.
Lunatic, disputing with, 317.

M

Macbeth's crime, instigation of, 160.
Magical arts, 149.
Magistrate, examination before, 46.
Maiden-rent, 299.
Maiming, 229.
Malefactor, 414.
Malice, 164.
Manacles, 389.
Manly combat, trial by, 49.
Manor-court, 127.
Manors, 215.

References are to Sections.

Manors, wasting in military preparations, 333.
Margery Jourdemayn's case, 278.
Marital relation, laws protection of, 364.
Marriage, contract of, 3.
Marriage to prostitute, punishment by, 37.
Martial law, 263.
Master, servant assaulting, 130.
Mercy, Portia's plea for, 93.
Mesne process, arrest on, 154.
Military law, king's right to prisoners under, 217.
Misdemeanors, 14.
Misprison, 12.
Modesty of justice, 442.
Moiety, 89.
Money paid in earnest, 259.
Mortgaged property, forfeiture of, 511.
Motion to dismiss appeal, 342.
Motive for crime, 258.
Movables, 325.
Murder, 163.
Murder, divine law against, 323.
Murder, lawful killing not, 434.
Murder to kill murderer illegally, 458.
Murder, warrant not protection for, 319.

N

Nature of Shylock's suit, 92.
Negligence distinguished from willfulness, 137.
New plea, setting up, 5.
Night watch, duties of, 43.
No corrupted justice above, 471.
No slander to speak the truth, 460.
Non-suit, 477.
Not guilty, 139.
Notary, attestation by, 496.

O

Oath, subscribing to, 59.
Oath, witness', 2.
Open to the law, 281.
Opportunity spurns right and law, 498.
Ordeal, 312a.
Othello's election to stand upon Desdemona's evidence, 480.
Outlaw, 269.

P

Packing a witness, 134.
Pardon, plea for, 26.
Parent and child, under Greek law, 54.
Parents' consent to child's marriage, 57.
Parents' right of infanticide by Athenian law, 55.
Parliament, acts of, 305.
Parricide, 446.
Partners, 271.
Party plaintiff, 18.
Party-verdict, 192.
Pawn, 373.
Peace, bond to keep, 454.
Peace, breach of, 39.
'Peaching on accomplice, 219.
Penalty of the law, 61.
People's cause motive for Brutus' murder, 404.
Per se, 359.
Perjury, 291.
Perjury, crime of, 71.
Pictures, to identify criminals, 447.
Piercing statutes, 388.
Pillory, punishment by, 131.
Pity the virtue of law, 377.
Plaintiff, 18.
Plea for judgment, 95.

References are to Sections.

Plea for justice, 30.
Plea for pardon, 26.
Plea of forfeiture, 84.
Pleaders, 393.
Pleading cause, 336.
Pleading false titles, 385.
Pleading for fee, 56.
Pleading for right in wilderness without law, 494.
Pleas in abatement, 473.
Plunging into law, 378.
Poison, Italian law against sale of, 462.
Poor man's right in law, 438.
Portia's judgment on the bond, 100.
Portia's plea for mercy, 93.
Possessed, 197.
Post, of sheriff, 13.
Praemunire, writ of, 348.
Praise by hearsay, 505.
Precedent, effect of legal, 99.
Pregnancy, condemned woman's privilege of, 274.
Preliminary examination for burglary, 48.
Preliminary hearing, 45.
Premises, 118.
Prerogative of King, 140.
Pressing to death, punishment by, 40.
Primogeniture, 104.
Prince's right, encroachment on, 427.
Prison, child born in, 141.
Prisoner, 157.
Prisoners' fees, 138.
Privileged man, 365.
Privity, 332.
Process, 396.
Proclamation, 266.
Proof, 11.
Proof of facts apparent, 428.
Proof required of Desdemona's seduction, 479.
Proof of guilt beyond reasonable doubt, 485.
Property, confiscation of, 1.
Prorogue, 413.
Prosecution for contempt, 433.
Prostitution before the law, 24.
Punishment by the pillory, 131.
Punishment by marriage to prostitute, 37.
Punishment by pressing to death, 40.
Punishment by stocks, 235.
Punishment, commutation of, 101.
Punishment for seduction, by Venetian law, 27.
Purging impeachment, 463.
Purging one's self, 351.
Pursuivant, 279.

Q

Qualifications of constable, 42.
Quid pro quo, 273.
Quietus, 469.
Quillets of the law, 77.

R

Rack, extorting evidence on, 82.
Rape, 181.
Ravishment, 358.
Reasonable doubt, proof of guilt beyond, 485.
Receipt, 72.
Regress, right of, 8.
Rejoinders, 371.
Remainders, 123.
Repeal, 203.
Reprisal, 230.
Reservation in grant, 445.
Resisting law, 395.

References are to Sections.

Respondeat superior, not applicable to king and subject, 261.
Retainers, 339.
Reversion, 193.
Rewards, 321.
Richard III an embryonic criminal, 308.
Richard III's crimes prompted by his isolation, 312.
Richard III's inherited criminal instinct, 328.
Richard III's morbid vanity, 309.
Right of egress and regress, 8.
Right warring with right, 369.
Rightful plea for justice, 503.
Righting grand jury, 220.
Rigour of the law, 282.
Riot, 243.
Robbery, 224.
Rotten case, 242.
Royalties, 198.

S

Sanctuary, benefit of, 324.
Sanctuary, Elizabeth's plea of, 311.
Sale of life tenure, 456.
Sale of poison contrary to Italian law, 462.
Sales of meat during lent, 294.
Salic law and Henry V's claim to France, 251.
Scales of justice, 52.
Scope of justice, 386.
Seal, 88.
Seal-Manual, conveyance by, 491.
Sealing written instrument, 81.
Seditious bills, 248.
Seduction, 174.
Seduction, punishment for, 27.
Seize, 201.
Self-defense, killing in, 380.
Sentence, 25.
Sentence of Duchess of Gloster, 285.
Sequestration against Desdemona, 481.
Servant assaulting master, 130.
Serving clients, 440.
Sessions of court, 337.
Setting up new plea, 5.
Severalty, 70.
Severe judge, 28.
Sheriff's post, 13.
Shylock's plea, justice of, 96.
Shylock's suit, nature of, 92.
Signories, 210.
Simony, 350.
Single ownership, 166.
Skull, Hamlet's legal comments on, 475.
Slander, action of, 23.
Slander, prosperity of, 78a.
Slanders, compromising, 7.
Solicitor, duties of, 67.
Source of law, 295.
Sovereign power, 186.
Specialties, 73.
'Squire, 173.
Standing mute in criminal case, 209.
Standing for law, 87.
Star-chamber, 6.
Statute-caps, 78.
Statutes of laborers and mechanics, 399.
Statutes of the street, 41.
Stocks, punishment by, 235.
Strays, impounding, 254.
Streets, statutes of, 41.
Subornation, 156.
Suborned testimony, false indictment on, 486.
Subscribing to oath, 59.
Summoners, 450.

References are to Sections.

Surety, 68.
Surmises not proof, 144.
Swords as laws during Richard's reign, 331.

T

Tainted plea, 82a.
Taken with the manner, 63.
Tarpeian Rock, 394.
Taxes, 290.
Tender, 98.
Tendered, 4.
Tenement, 196.
Term of apprentice, 222.
Terms of the law, 19.
Testament, 107.
Theft, 119.
Thievery, justified, 383.
Third-borow, 126.
Time overthrows law and custom, 135.
Time wronging wronger, 501.
Tithes, 183.
Title, 69.
Title by confirmation, 302.
Title by descent and purchase distinguished, 412.
Torture by boiling in oil, 146.
Treason, 76.
Trespass, 136.
Trespass *vi et armis*, 465.
Trial at law, 345.
Trial by battle, 191.
Trial by battle, equal rank in, 453.
Trial by comitia, 398.
Trial by eye and heart, 507.
Trial by manly combat, 49.
Trial day, 212.
Trial of Buckingham for treason, 334.
Tripartite agreements, 225.
Truant in the law, 267.
Trust from fiduciary relation, 162.
Truth, no slander to speak, 460.
Tybalt's death murder at Romeo's hands, 459.

U

Under gage, 211.
Underwriting one, 366.
Uulawful intent, 122.
Unreversed judgment, 4.
Unwhipped crimes, 449.
Use, conveyance in, 102.
Use, leaving property in, 411.
Usurer, 83.
Usurpation, 176.

V

Vacations of court, 112.
Venetian law, against seduction, 27.
Venue and offense charged, 651.
Verdict, 192.
Verdict based on perjury, 352.

W

Wager contract, conditions of, 418.
Wards, heirs of fortune, kings, 116.
Warrant no protection against murder, 319.
Warranty, 79.
Waste, 9.
Waste upon real estate, 194.
Wasting manors in military preparations, 333.
Wedlock, legitimacy of child born during, 171.
Wheel, death by the, 397.

References are to Sections.

"Whipped from tithing to tithing," 451.
Wife's legal status, 455.
Wilderness without law, no right in, 494.
Willfulness, negligence distinguished from, 137.
Windy side of the law, 16.
Witchcraft, 149.
Witness, oath of, 2.
Witness, packing, 134.
Witness to action, 420.
Witnesses, bawds not competent, 384.
Writ, *extendi facias*, 111.
Writ of praemunire, 348.
Written instrument, sealing, 81.
Wronger wronged by time, 501.

Y

York's title to the crown of England, 284.